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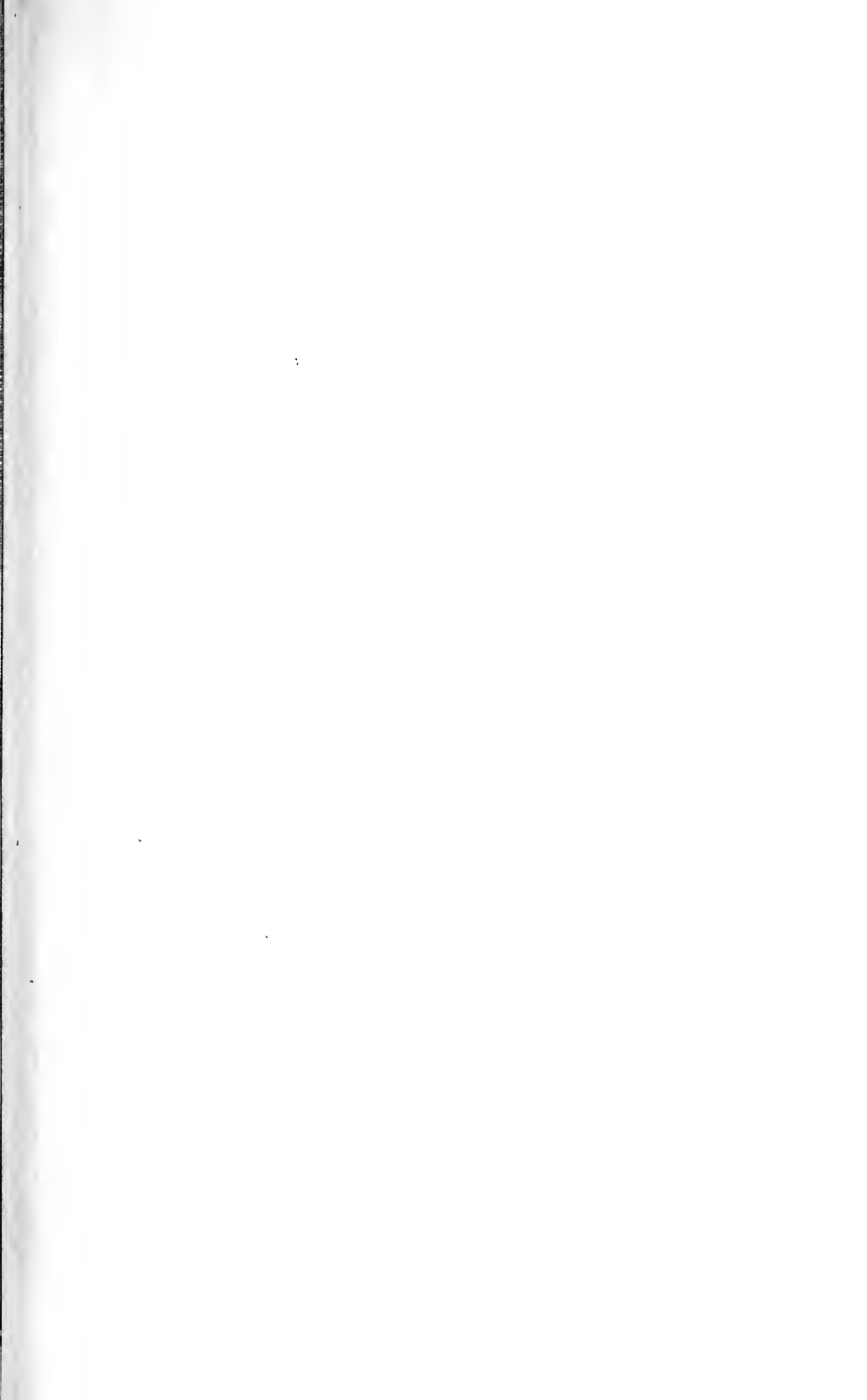
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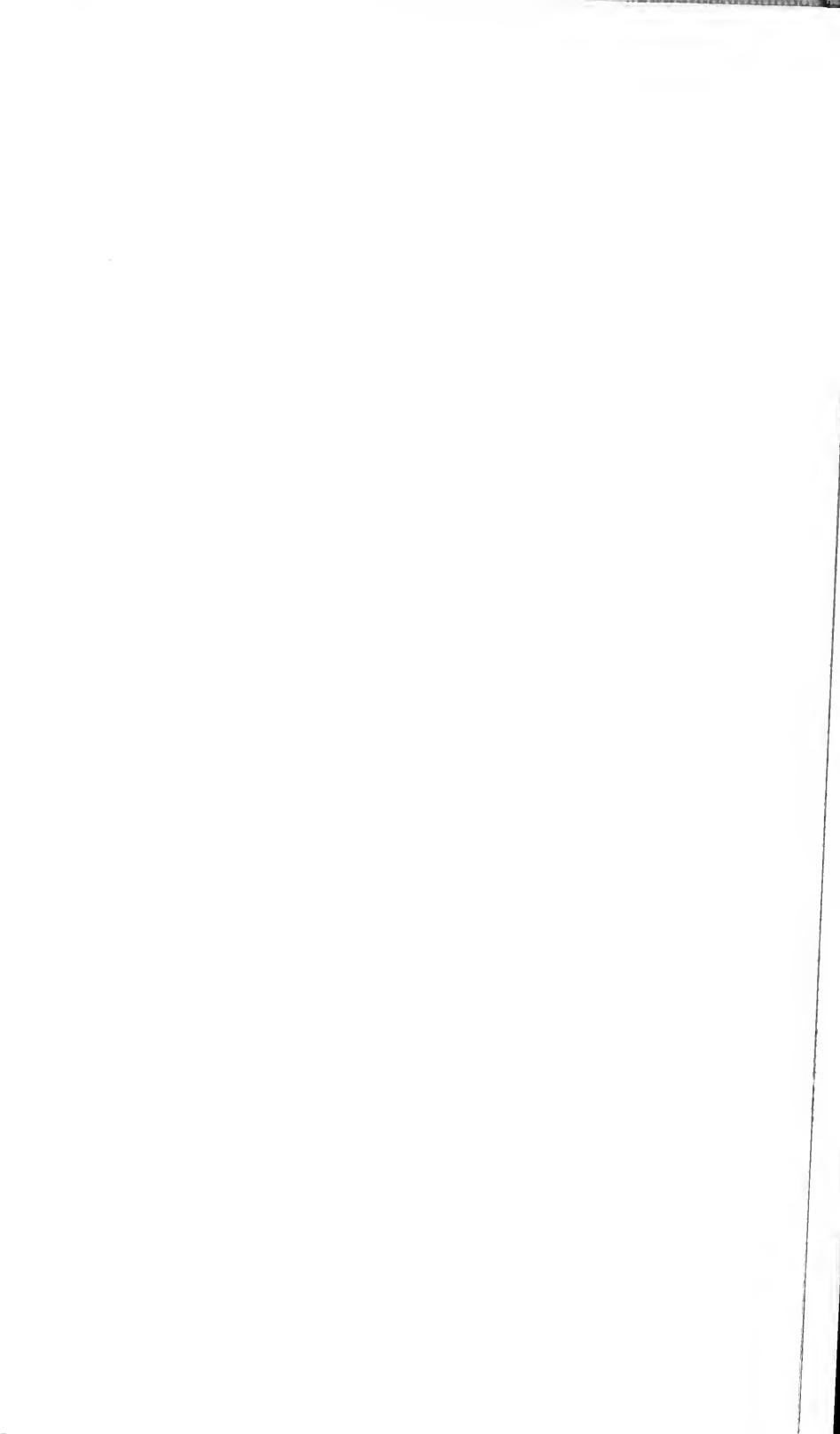
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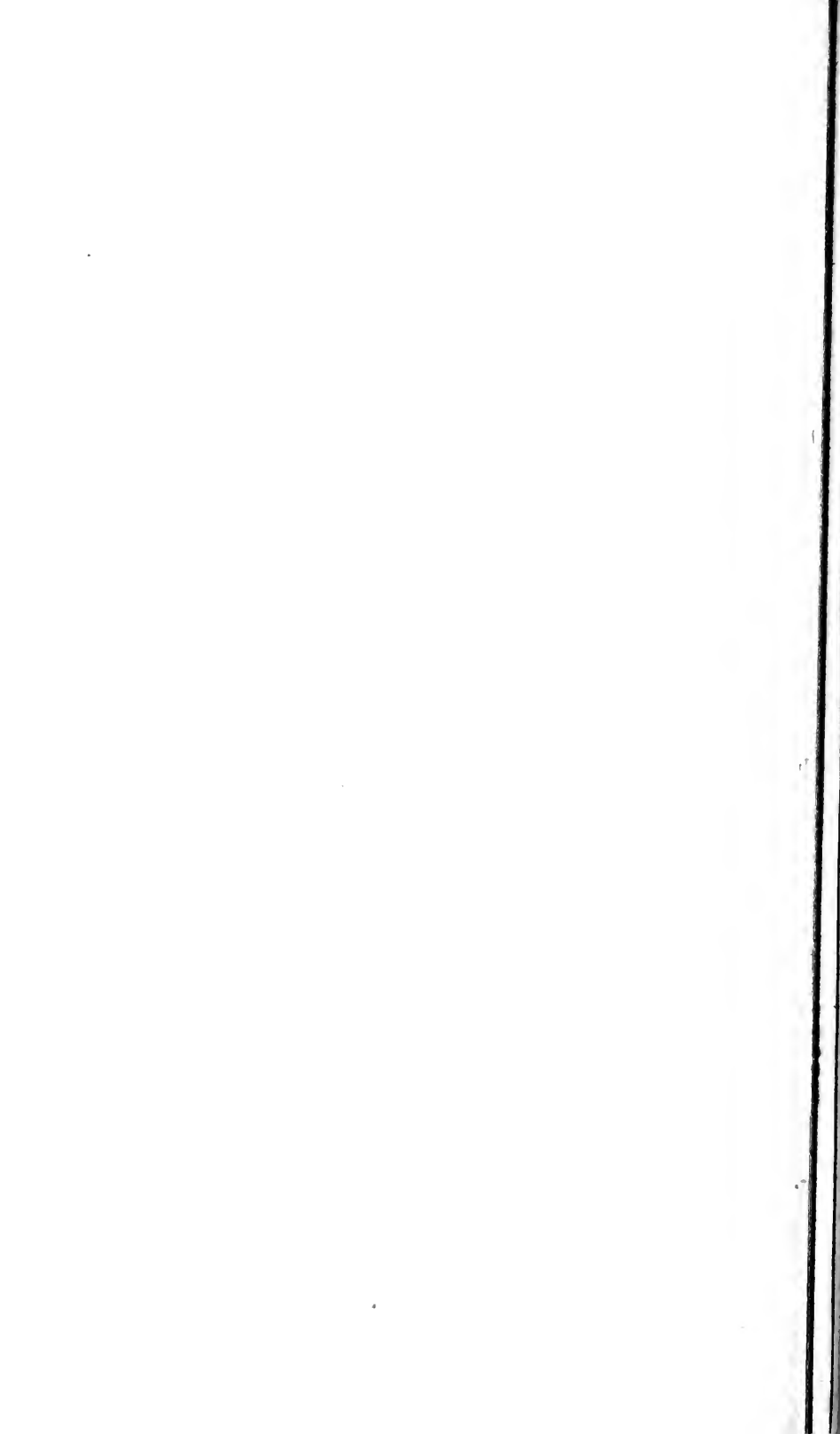
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v. 2831

No. 13883

United States
Court of Appeals
For the Ninth Circuit.

LESLIE H. CHAPPELL,

Appellant.

vs.

C. D. JOHNSON LUMBER CORPORATION,

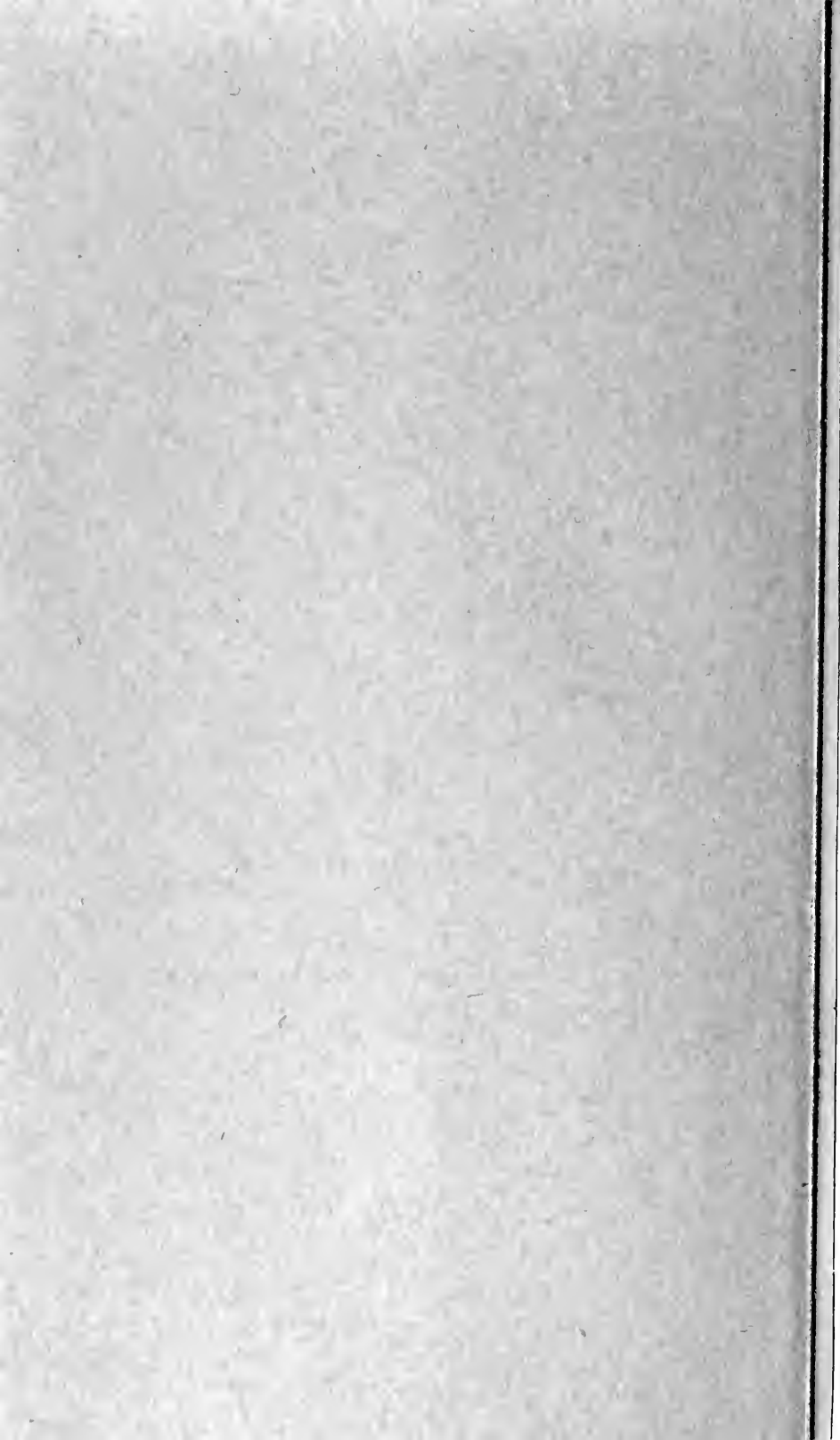
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

AUG 31 1953



No. 13883

**United States
Court of Appeals**
For the Ninth Circuit.

LESLIE H. CHAPPELL,

Appellant.

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon.**

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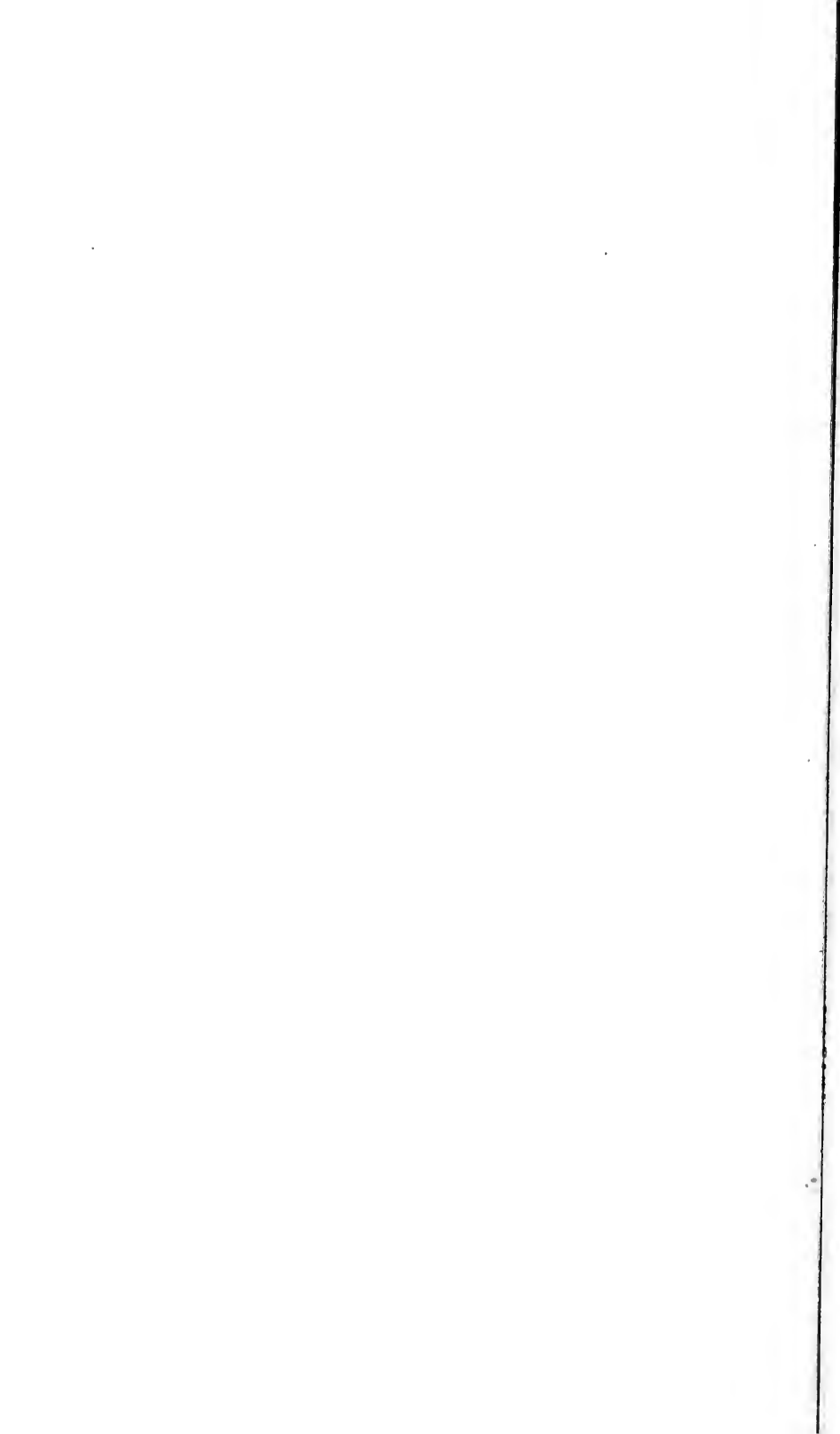
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

GREEN, RICHARDSON & GREEN;

BURL L. GREEN,

Corbett Building,

Portland 4, Oregon,

For Appellant.

KING, MILLER, ANDERSON, NASH &
YERKE;

FRANK E. NASH,

926 American Bank Building,

Portland 5, Oregon,

For Appellee.



The United States District Court for the
District of Oregon

Civ. 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

PETITION FOR REMOVAL

To The Honorable Judges of the United States Dis-
trict Court for the District of Oregon:

The petition of C. D. Johnson Lumber Corpora-
tion, a corporation, herein impleaded as C. D. John-
son Lumber Corp., a corporation, the defendant
above named, appearing specially and for the sole
and exclusive purpose of presenting this petition,
shows that:

On or about the 7th day of September, 1951, there
was commenced in the Circuit Court of the State
of Oregon, for the County of Lincoln, Civil Action
No. 9954, wherein the above-named Leslie H. Chap-
pell is plaintiff, and the above-named C. D. Johnson
Lumber Corporation, a corporation, your petitioner
herein, is defendant. After the commencement of
said action and on the 8th day of September, 1951,
service of complaint and summons therein was had
upon the defendant in Lincoln County, Oregon.
Copies of said complaint and summons are attached

hereto marked Exhibits A and B, respectively, and made a part hereof. No service or attempted service of any other process, pleadings or orders has been had upon defendant.

Said action is one of a civil nature, wherein the matter in controversy exceeds the sum of \$3,000, exclusive of interest and costs, and is, to wit, \$24,-387.90.

Said matter in controversy is between citizens of different states. Your petitioner, the defendant C. D. Johnson Lumber Corporation, a corporation, at the time of the commencement of said action was, ever since has been and still is a foreign corporation, created by and existing under the laws of the State of Nevada, and at all said times was and is a citizen and inhabitant of the State of Nevada, and not a citizen of the State of Oregon.

The plaintiff Leslie H. Chappell at the time of the commencement of said action was, ever since has been and still is a citizen and resident of the State of Oregon and a non-resident of the State of Nevada.

Said action is pending undetermined in the Circuit Court of the State of Oregon for the County of Lincoln, and twenty days after commencement of the action or after service of process in said action has not as yet expired.

Your petitioner desires to remove said action to the United States District Court for the District of Oregon, the district within which said action is pending. Your petitioner, as defendant in said action, makes and files with this petition a bond with good and sufficient surety, conditioned that the defend-

ant will pay all costs and disbursements incurred by reason of these removal proceedings, should it be determined that the case was not removable or was improperly removed.

Wherefore, your petitioner prays that upon the filing of the petition and bond herein and the giving of written notice to plaintiff, and upon the filing of a copy of this petition with the Clerk of the Circuit Court of the State of Oregon for the County of Lincoln, said action shall be deemed removed from said Circuit Court of the State of Oregon for the County of Lincoln to the United States District Court for the District of Oregon pursuant to the statutes of the United States in such cases made and provided.

C. D. JOHNSON LUMBER
CORPORATION,

KING, WOOD, MILLER,
ANDERSON & NASH,

By /s/ FRANK E. NASH,
Attorneys for Defendant.

United States of America,
District of Oregon,
State of Oregon—ss.

I, G. Hippler, being first duly sworn, depose and say that I am Assistant Secretary of C. D. Johnson Lumber Corporation, a corporation, the defendant herein; that I make this affidavit for and in behalf of said corporation; that I have read the foregoing

petition for removal, know the contents thereof, and the same is true as I verily believe.

/s/ G. HIPPLER.

Subscribed and sworn to before me this 15th day of September, 1951.

[Seal] /s/ CURTIS W. CUTSFORTH,
Notary Public for Oregon.

My commission expires 7/15/55.

EXHIBIT A

In the Circuit Court of the State of Oregon for the
County of Lincoln

No. 9954

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORP., a Corporation,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant above named, complains and alleges:

I.

That at all times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, with a principal

office and place of business in the City of Portland, County of Multnomah, State of Oregon; that defendant has a plant located at Toledo, County of Lincoln, State of Oregon; which is engaged generally in the handling, loading, manufacturing and changing of lumber products and in such activity defendant makes extensive use of power-driven machinery; that defendant, in the furtherance of its business, as above set forth, employed an overhead crane or monorail operator whose particular job it was to pick up lumber off blocks and set it on blocks on a barge at the plant or establishment at Toledo, Oregon.

II.

That on or about November 22, 1950, plaintiff was in the employ of defendant as a spotter on what is known as the "cargo slip"; that plaintiff's duties on said job were to work on a barge brought into said slip; that on the dock a lumber carrier sets lumber on blocks and an overhead crane or monorail picks up lumber off the blocks, takes it to the barge and sets it on blocks on the barge; that plaintiff's particular duty was to set and keep the blocks on the barge straight; that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was walking away, the tongs of the crane

struck plaintiff in the back, causing severe and serious injuries as more particularly set forth hereinafter.

III.

That on November 22, 1950, there was in effect in the State of Oregon what is commonly termed a "Safety Code for Sawmill, Woodworking, and Allied Industries of Oregon," effective January 2, 1946, promulgated and issued by the State Industrial Accident Commission of Oregon, which said code has heretofore been promulgated by said Commission for the benefit and safety of persons engaged in the sawmill industry in Oregon, including the plaintiff herein; that as a part thereof, under the general heading of "Loading, Stacking, Storage and Conveying," Rule 5.2, it is provided as follows:

"Units or loads of lumber shall not be lifted or moved until all employees are in the clear"

That defendant was reckless, careless and negligent in not complying with the said provision.

IV.

That defendant was reckless, careless and negligent in the following particulars:

(1) In operating said overhead crane or monorail in a reckless manner without any regard for the safety of the employees and, in particular, for the safety of this plaintiff;

(2) In failing to keep a proper or any lookout while engaged in the operation of said crane or monorail;

(3) In moving said crane or monorail without sounding a warning of any kind;

(4) In letting said monorail tongs down gradually as said cab moved forward rather than waiting until the cab was directly over the load and letting said tongs straight down.

(5) In failing to provide a safe place to work;

(6) In failing to notice and avoid striking plaintiff;

(7) In failing to use every device, care and precaution practicable to be used in that defendant could have operated said overhead crane or monorail with regard for the safety of the employees and in particular for the safety of plaintiff; could have kept a proper lookout while engaged in the operation of said crane or monorail; could have sounded a warning of some kind before moving said crane or monorail; could have let tongs straight down when the cab was directly over the load instead of letting said tongs down gradually as cab moved forward; could have provided a safe place to work and could have noticed and avoided striking plaintiff, all of which would have in no way impaired the efficiency of the operation.

V.

That as a direct and proximate result of the recklessness, carelessness and negligence of the defendant the heavy steel tongs of said crane or monorail struck plaintiff in the back causing severe bruises, contusions and lacerations to said back and further

tearing, twisting and wrenching the bones, muscles, ligaments and tendons of said back so that, over a long period of time, the pain was extremely severe in plaintiff's back and radiated down plaintiff's legs; that plaintiff has been forced to wear a brace on said back ever since said accident; plaintiff alleges that all of said injuries are permanent and all to his damage in the sum of \$60,000.00.

VI.

That prior to said accident plaintiff was a healthy and able-bodied working man of the age of 35 years with a life expectancy of 33.44 years, earning the sum of \$1.70 $\frac{1}{2}$ per hour, plus time and a half for all hours worked in any one week over forty; that as a direct and proximate result of the recklessness, carelessness and negligence of the defendant, plaintiff suffered a wage loss in the sum of \$2387.90 to the time of filing this complaint and has incurred doctor, nurses' and medical expenses in the sum of \$200.00 and reserved the right to amend his complaint at the time of trial to show the true amount of his special damages.

VII.

Plaintiff requests a jury trial.

Wherefore plaintiff demands judgment against the above-named defendant in the full sum of Sixty Thousand and 00/100 (\$60,000) general damages, in the full sum of Two Thousand Three Hundred Eighty-seven and 90/100 (\$2387.90) special damages and for his costs and disbursements incurred herein.

**GREEN, RICHARDSON &
GREEN,**

Attorneys for Plaintiff.

State of Oregon,
County of Lincoln—ss.

I, Leslie H. Chappell, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause; and that the foregoing Complaint is true as I verily believe.

LESLIE H. CHAPPELL.

Subscribed and sworn to before me this 29th day of August, A.D. 1951.

[Seal] W. C. EVANS,
Notary Public for Oregon.

My commission expires 4/20/53.

EXHIBIT B

In the Circuit Court of the State of Oregon for the
County of Lincoln

No. 9954

LESLIE H. CHAPPELL,
Plaintiff,
vs.

C. D. JOHNSON LUMBER CORP., a Corporation,
Defendant.

SUMMONS

To: C. D. Johnson Lumber Corp., a Corporation,
Defendant.

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above-entitled cause within

ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will demand judgment against you in the full sum of Twenty-two Thousand and 00/100 (\$22,000.00) Dollars general damages, in the further sum of Two Thousand Three Hundred Eighty-seven and 90/100 (\$2387.90) special damages, and for his costs and disbursements incurred herein.

GREEN, RICHARDSON &
GREEN,

Attorneys for Plaintiff.

[Stamped]: Received Sept. 7, 1951. Timothy P. Welp, Sheriff of Lincoln Co., Oregon.

[Endorsed]: Filed September 15, 1951.

[Title of District Court and Cause.]

ANSWER

First Defense

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Answering paragraph II of plaintiff's complaint, defendant admits that on or about November 22, 1950, plaintiff was in the employ of defendant as a spotter on what is known as the "cargo slip," that plaintiff's duties on said job were to work on a barge brought into said slip, that an overhead crane or monorail takes lumber to barges for loading, and that among plaintiff's duties was that of setting and keeping the blocks on barges straight. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph II of plaintiff's complaint, and defendant denies each and every such remaining allegation contained in said paragraph II.

III.

Defendant admits that on November 22, 1950, there was in effect in the State of Oregon what is commonly termed a "Safety Code for Sawmill, Woodworking, and Allied Industries of Oregon," promulgated and issued by the State Industrial Accident Commission of Oregon for the benefit and safety of persons engaged in the sawmill industry in Oregon, including the plaintiff herein, and defendant admits all the terms and provisions of said Safety Code. Defendant denies each and every other allegation contained in said paragraph III.

IV.

Defendant denies each and every allegation contained in paragraph IV of plaintiff's complaint.

V.

Defendant denies each and every allegation contained in paragraph V of plaintiff's complaint and the whole thereof, and particularly denies that plaintiff has been damaged in the sum of \$22,000 or in any sum by reason of any act or omission on the part of this defendant.

VI.

Defendant denies each and every allegation contained in paragraph VI of plaintiff's complaint.

Second Defense

If, as alleged by plaintiff, plaintiff did, on or about November 22, 1950, meet with an accident and sustain any personal injuries, then said accident was caused by plaintiff's carelessness and negligence in that whatever risk or danger may have existed in connection with plaintiff's work was open, visible and plain to be seen and understood by any sawmill employee, including plaintiff, notwithstanding which plaintiff failed to observe or use ordinary care for his own safety.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff take nothing thereby but that the same be dismissed, and that defendant have and recover of and from plaintiff defendant's costs and disbursements herein incurred.

KING, WOOD, MILLER,
ANDERSON & NASH,
/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed September 28, 1951.

[Title of District Court and Cause.]

MOTION

Defendant respectfully moves the court for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure, as amended, or in the alternative for summary judgment under Rule 56.

Defendant's motion is upon the ground that plaintiff's complaint herein shows that at the time plaintiff alleges he received injury he was in the employ of defendant at work aboard a barge upon the waters of the Yaquina River engaged in the work of loading the barge with lumber.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Section 901 et seq., provides that liability of an employer for compensation under that act is exclusive and in place of all other liability.

KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ FRANK E. NASH,
Attorneys for Defendant.

To Leslie H. Chappell, plaintiff above-named, and
to Burl L. Green and Green, Richardson and
Green, his attorneys:

Please take notice that the undersigned will bring the within motion on for hearing before the above-entitled court at the United States Courthouse, Portland, Oregon, on the 6th day of October, 1952, at

10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed September 23, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Leslie H. Chappell, being first duly sworn, do depose and say:

That I am the plaintiff in the above-entitled suit; that prior to the time defendant's motion for summary judgment was filed I had no information concerning any rights that I might have under the Longshoremen's and Harbor Workers Compensation Act; and that in fact I had never heard of such Act prior to the time the motion was filed; that to my knowledge there was nothing posted at any conspicuous place on the C. D. Johnson premises, notifying myself or other employees that the defendant C. D. Johnson Lumber Corporation had secured payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Concerning my job at the C. D. Johnson Lumber Company, it was principally as a spotter on barges,

and in the performance of said job I often was on shore, as well as on the barge; that occasionally my job was to work exclusively ashore when I was doing something besides spotting on the barges; that my pay was the same pay as the laborers received who worked exclusively on the shore.

/s/ LESLIE H. CHAPPELL.

Subscribed and sworn to before me this 16th day of March, 1953.

[Seal] /s/ BURL L. GREEN,
Notary Public for Oregon.

My commission expires July 27, 1953.

Service of copy acknowledged.

[Endorsed]: Filed March 16, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The motion of defendant, C. D. Johnson Lumber Corporation, for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure having been presented, and Burl L. Green, counsel for plaintiff, and Frank E. Nash, counsel for defendant, having been heard on the motion, and it appearing by stipulation of counsel in open court that plaintiff received the injury of which he complains upon the navigable waters of the United States while aboard

a vessel of more than 18 tons net, and memoranda of authorities having been submitted on behalf of the parties, and the court being fully advised, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Defendant is a corporation organized and existing under and by virtue of the laws of Nevada, and is operating a sawmill at Toledo, Oregon, where defendant manufactures, handles and loads lumber products, a portion of which is moved by water.

II.

At all times herein material defendant's lumber carriers deposited loads of lumber on blocks on defendant's sawmill dock in the Yaquina River. By means of an overhead monorail crane, defendant picked up lumber from the sawmill dock and loaded the lumber on barges in the cargo slip at defendant's dock. When loaded the barges were moved on the Yaquina River by tugboats.

III.

Plaintiff was employed by defendant as a "spotter" in the loading of barges. Plaintiff's work was upon the barges being loaded in the cargo slip, and his particular duty was to set and keep straight the blocks on the deck of the barge onto which the lumber was loaded by the crane. On or about November 22, 1950, plaintiff was aboard a barge upon the navigable waters of the United States, and he sus-

tained injuries arising out of and in the course of his employment while the barge was being loaded with cargo. Specifically, plaintiff in his complaint contends: "that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was walking away, the tongs of the crane struck plaintiff in the back, causing severe and serious injuries * * *." Plaintiff was not a master or member of a crew of any vessel. The barge aboard which plaintiff was injured was a vessel of over 18 tons net and of approximately 200 tons net.

IV.

At all times herein material defendant was an employer, some of whose employees, including plaintiff, were employed in maritime employment in whole or in part upon the navigable waters of the United States.

Conclusions of Law

I.

When injured, plaintiff was engaged in maritime employment for his employer upon the navigable waters of the United States. Plaintiff's injury occurred and arose out of and in the course of his employment aboard a vessel in navigable waters of the United States.

II.

Recovery for disability resulting from such injury through Workmen's Compensation proceedings may not validly be provided by state law.

III.

The injury and disability of which plaintiff complains are exclusively within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901 et seq. Plaintiff cannot maintain an action against defendant to recover damages for such injury under the Employers' Liability Act of the State of Oregon.

IV.

Defendant is entitled to summary judgment for the reason that the pleadings and admissions by stipulation of the parties show that there is no genuine issue as to any material fact necessary to a determination that the injury of which plaintiff complains is a matter within the federal maritime jurisdiction and within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

Dated this 21st day of April, 1953.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 21, 1953.

The United States District Court
for the District of Oregon

Civil No. 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly before the court upon the motion of defendant C. D. Johnson Lumber Corporation, for summary judgment, and plaintiff having appeared in person and by Burl L. Green, of his attorneys, and defendant having appeared by Frank E. Nash, of its attorneys, and counsel for the parties having stipulated as agreed facts that plaintiff at the time of the injury of which he complains was aboard a barge of more than 18 tons net and was engaged in the work of loading the barge upon the navigable waters of the United States, and counsel for the parties having been heard upon the motion and memoranda of authorities having been submitted on behalf of the parties, and the court having considered the pleadings and all other matters filed herein and being fully advised, and the court having filed its findings of fact and conclusions of law, it is hereby
Ordered, Adjudged and Decreed that Defendant

C. D. Johnson Lumber Corporation's motion for summary judgment be and the same hereby is granted, and that plaintiff have and recover nothing by his suit herein, and that defendant have and recover of and from plaintiff its costs to be taxed by the clerk.

Dated this 21st day of April, 1953.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 21, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. D. Johnson Lumber Corporation, a corporation, and to King, Wood, Miller, Anderson & Nash, its attorneys:

Notice is hereby given that Leslie H. Chappell, plaintiff above-named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain order and judgment of this court, made and entered on April 21, 1953, wherein a summary judgment was entered in favor of the above-named defendant.

Dated this 7th day of May, 1953.

/s/ GREEN, RICHARDSON &
GREEN,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed May 14, 1953.

[Title of District Court and Cause.]

CONDENSED STATEMENT IN NARRATIVE
FORM OF TESTIMONY OF PLAINTIFF-
APPELLANT ON DEPOSITION SEPTEMBER 2, 1952

The following is the narrative form of the testimony by deposition of plaintiff on September 2, 1952, as set forth on pages 22 to 25, inclusive, of the transcript of deposition, the original of which is filed with this court:

At the time of the accident November 22, 1950, I had been working as a spotter on barges approximately 2½ months. It happened approximately 9:00 o'clock in the evening. Just before the accident I was at about the center of the barge, which is approximately 40 or 50 feet wide, and I was about a third of the way down toward the inshore end of the barge. I got down on the floor of the barge when the monorail crane operator started to set his load of lumber down on the barge. He set his load down. I turned it loose and hopped back up and walked 10 or 12 feet when the monorail crane operator moved without raising his tongs high enough to clear me and the tongs bumped me across the small of the back.

KING, MILLER, ANDERSON,
NASH & YERKE,

/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed June 4, 1953.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 20, inclusive, consisting of Petition for removal; Answer; Motion for postponement of date of trial; Order setting pre-trial conference date; Motion to increase amount of damages, etc.; Order allowing increase in amount of damages; Defendant's motion dated September 23, 1952; Record of hearing on motion for summary judgment; Order setting date for argument on motion for summary judgment; Affidavit of Leslie H. Chappell; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Bond for costs on appeal; Designation of contents of record on appeal; Statement of points on which plaintiff-appellant intends to rely on appeal; Appellee's designation of additional portions of the record, etc.; Condensed statement in narrative form of testimony of plaintiff-appellant on deposition September 2, 1952; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6169, in which Leslie H. Chappell is plaintiff and appellant, and C. D. Johnson Lumber Corporation, a corporation, is defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

I further certify that there is inclosed herewith transcript of proceedings in re: motion of defendant for summary judgment, March 16, 1953.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 19th day of June, 1953.

[Seal] /s/ F. L. BUCK,
 Acting Clerk.

United States District Court
District of Oregon

No. Civil 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

TRANSCRIPT OF PROCEEDINGS IN RE MO-
TION OF DEFENDANT FOR SUMMARY
JUDGMENT

March 16, 1953, 11:00 o'Clock A.M.

Before: The Hon. Gus J. Solomon,
District Judge.

Appearances:

BURL L. GREEN,
Of Attorneys for Plaintiff;

FRANK E. NASH,
Of Attorneys for Defendant.

Mr. Green: Before we begin, your Honor, for the record, may I file an affidavit signed by the plaintiff and certified upon so March 16, 1953?

The Court: Yes. First, I think we ought to read the admissions into the record.

Mr. Nash: That is what I prefer, if your Honor please.

The Court: Go ahead.

Mr. Nash: In the plaintiff's Complaint, it is stated that the plaintiff here was aboard a barge at the time he suffered injury, and it has since been agreed, I think, and made a matter of record in the plaintiff's brief filed here, that the barge was at the time of the injury, on navigable waters of the United States.

There was a question of your opinion as to whether or not the barges upon which the plaintiff was required to work were in excess of 18 tons net. It was one of the conditions that were covered by the act, that the vessel be in excess of 18 tons. Your Honor will recall, I think, at one time due to my error I was a little crossed up on the dates, and I called up from Toledo, the superintendent of the loading operation and explained it, that we wanted him to give testimony in support of our motion for

summary judgment to the effect that all of the barges used in those operations were of approximately 200 tons net so far as the act was concerned.

Your Honor suggested that since Burl was trying the case in the State Court, that I contact him at recess, or when it was possible. I did that, but I have not talked specifically with Burl with respect to the tonnage, but I think that matter should be covered. Would you be prepared to admit that the barges were in excess of 18 tons net?

Mr. Green: Mr. Nash gave me a picture of a barge, and I showed it to Mr. Chappell at the time he was up to Portland. He does not know whether it was the barge or not, but it was the approximate size, and I will admit it was a barge in excess of 18 tons so far as the jurisdictional portion of the long-shoreman's act is concerned. We will admit it for that purpose.

The Court: All right.

Mr. Nash: Well, then, your Honor, we have a factual situation in which it is admitted that Mr. Chappell was injured in the course of his employment while aboard a vessel in excess of 18 tons upon the navigable waters of the United States, and that the work which he was doing was, as stated in his complaint, the work of spotting these barge deckloads of lumber which were carried from the defendant's mill or from the defendant's dock on the barges by means of an overhead crane which lifted units of lumber with a tong-type of apparatus.

The Court: Where was this boom or derrick, on the barge itself?

Mr. Nash: No, the equipment is really not a boom. It is an overhead crane which is constructed upon a permanently constructed overhead frame supported by piling, and the crane runs along this overhead something like a steel mill, for example, where they have overhead cranes.

The Court: Yes, I know that. It is rectangular-shaped, rather than A-frame; is that right?

Mr. Green: If I understand your question, it is a monorail that runs through the whole plant, and this portion comes out over the barge, direct connection up on shore.

Mr. Nash: Well, when it runs out over the barges, of course, the supporting pillars are piling driven into the water.

(Discussion between Court and counsel.)

Mr. Nash: Now, there is one other condition which has been mentioned by the plaintiff, and that is as to whether the defendant had secured compensation as required under the act.

I may state to your Honor that that compensation has been secured, was secured at the time by the St. Paul Mercury Indemnity Company, and I have discussed that heretofore with Mr. Green, and my feeling is that that is a condition subsequent, really in the nature of a condition subsequent, but I think perhaps that point, if Burl is not yet satisfied, could be reserved until he has had an opportunity to examine the actual policy.

The Court: You mean at the time of the accident there was a policy which would protect em-

ployees of the C. D. Johnson Lumber Company who were engaged in work covered by the Longshoremen's and Harbor Workers' Act?

Mr. Nash: Yes, your Honor, the Act requires that the compensation be secured through private insurers.

The Court: And that prior to the accident, there was such a policy?

Mr. Nash: Yes, sir.

(Argument to the Court by counsel.)

The Court: Let us get back to the record in this case. I understand that you are not admitting first, that the defendant had a policy of insurance to cover it for the claims under the Longshoremen's and Harbor Workers' Act?

Mr. Green: That is right.

The Court: Second, that if it did have such coverage, that the employer failed to comply with the Act in that he failed to have notice posted in a conspicuous place and, perhaps, as to those other grounds as well?

Mr. Green: That is right, your Honor.

Mr. Nash: May I be heard just briefly on that?

The Court: Yes.

(Argument by counsel to the Court.)

(Hearing concluded.)

[Endorsed]: Filed June 4, 1953.

[Endorsed]: No. 13883. United States Court of Appeals for the Ninth Circuit. Leslie H. Chappell, Appellant, vs. C. D. Johnson Lumber Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 22, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The point on which appellant intends to rely in the above-entitled cause is as follows:

1. The District Court erred in allowing defendant's motion for summary judgment.

Dated this 23rd day of June, 1953.

GREEN, RICHARDSON &
GREEN,

By /s/ BURL L. GREEN,
Attorneys for Plaintiff-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 25, 1953.

In the United States Court of Appeals
for the Ninth Circuit

LESLIE H. CHAPPELL,
Plaintiff-Appellant,
vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,
Defendant-Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL



United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

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FILED

SEP 10 1953

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No. 13883

United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

**STATEMENT OF PLEADINGS
AND JURISDICTION**

The complaint was filed on September 7, 1951, in the Circuit Court of the State of Oregon for the County of Lincoln (R., pp. 3, 6). A petition for removal was filed in the United States District Court for the District of Oregon on September 15, 1951 (R., pp. 3, 12), on the basis that said controversy was between citizens of different states and exceeded the sum of \$3,000, thus giving

said court jurisdiction (Title 28, U.S.C.A., §1332, and Title 28, U.S.C.A., §1441). On September 28, 1951, an answer was tendered and filed by appellee (R., p. 12). On September 23, 1952, appellee filed a motion for summary judgment (R., p. 15), and said motion was granted by a judgment order dated April 21, 1953 (R., p. 21). Thereafter a notice of appeal was filed by appellant on May 14, 1953 (R., p. 22), and this court has jurisdiction to hear said appeal under 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

The appellee owned and operated an establishment in Toledo, Oregon, engaged in manufacturing, loading, handling and changing lumber products (R., p. 7). In short, appellee operated a sawmill. Appellant was employed by the appellee principally as a spotter in the part of the mill known as a cargo slip (R., p. 7). In the performance of his duties, appellant was often on shore and occasionally worked exclusively on shore. He was a laborer and received the same scale of pay as the laborers who worked in other portions of appellee's lumber mill (R. pp. 16, 17).

On November 22, 1950, a barge was brought into the cargo slip at appellee's mill. On the dock a stack of lumber had been set on some blocks, and an overhead or monorail crane, which runs throughout appellee's mill (R., p. 28), was to pick the lumber off of said blocks and put it down on the barge. Appellant's duty was to set some blocks on the barge at the point where the lumber was to be placed (R., p. 7). Appellant set a pair

of blocks, and the monorail crane had placed a stack of lumber on the blocks. Appellant was walking away from the area when the tongs of the crane struck him on the back, causing permanently disabling injuries (R., pp. 8, 9, 10). Appellant brought an action against his employer for damages. Almost one year after filing an answer to the complaint, appellee moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, on the basis that the Longshoremen's & Harbor Workers' Act, 33 U.S.C.A. 901, et seq., was the only remedy available to the plaintiff.

The question presented in this appeal is whether an employee of a lumber mill who was injured while on a barge over 18 tons in navigable waters on the premises of said mill is precluded as a matter of law from bringing an action based on negligence against his employer. Stating the same question in the reverse manner, is appellant's only remedy a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, supra? The order of the United States District Court for the District of Oregon is correct ONLY if

(1) It conclusively appears from the pleadings, depositions, affidavits and admissions that appellee had provided compensation as required by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., 901, et seq.,

AND

(2) It conclusively appears from the record that the only remedy available to the appellant is compensation under said Act.

SPECIFICATION OF ERROR

The District Court erred in granting appellee's motion for summary judgment.

ARGUMENT

Summary

- I.** From the record it does not appear that appellee has complied with the provisions of the Longshoremen's and Harbor Workers' Act, *supra*, and therefore an order rendering a summary judgment is erroneous.
- II.** The Longshoremen's and Harbor Workers' Compensation Act, *supra*, is not the only remedy available to appellant.
 - A.** Historically, the legislation of an individual state can be applied to injuries on navigable waters if to do so does not work material prejudice to the characteristic features of the general maritime law.
 - (1) Congress has consistently sought to give the remedies provided by an individual state the widest latitude constitutionally possible.
 - B.** A "twilight zone" exists wherein the injured party may, if he sees fit, seek a remedy provided by an individual state, even though the Longshoremen's and Harbor Workers'

Compensation Act, supra, might also be applicable.

(1) The work of appellant was within this twilight zone.

C. This action for damages is a proper remedy.

I. Compensation Has Not Been Provided by Appellee

Rule 56 of the Federal Rules of Civil Procedure provides that under certain conditions either party may move for a summary judgment. But the judgment shall only be rendered IF "the pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" (Rule 56 (c), Federal Rules of Civil Procedure). Certainly it is not established by the record that appellee has secured compensation in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

Title 33, U.S.C.A., Section 932 (a) of that Act, requires:

"Every employer shall secure the payment of compensation under this chapter—

"(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States

or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this chapter; or

"(2) By furnishing satisfactory proof to the Secretary of his financial ability to pay such compensation and receiving an authorization from the Secretary to pay such compensation directly. . . ."

Title 33, U.S.C.A., Section 914 (a) of said Act, provides that compensation be promptly paid unless liability to pay is controverted, and Section 914 (b) requires that the compensation shall be paid on the 14th day following the injury.

Title 33, U.S.C.A., Section 934, of the said Act, requires that the employer post notices in conspicuous places if it has secured this compensation. The notice must state the name and address of the carrier; that the compensation has been secured, and the date of the expiration of the policy.

Title 33, U.S.C.A., Sec. 905, gives to an injured employee the right to maintain an action at law for damages "if an employer fails to secure *payment* of compensation as required by this chapter" (*Italics ours*).

It was undisputed that appellant never heard of the Longshoremen's and Harbor Workers' Compensation Act or its benefits until the motion for summary judgment was filed almost two years after the accident (R., p. 16). In other words, there were no notices posted and no payment of compensation was made or tendered.

Appellant alleged that on or about November 22, 1950, he received a permanent injury while in the em-

ploy of the appellee (R., pp. 7, 10). If appellee had fully complied with the provisions of the Longshormen's and Harbor Workers' Compensation Act, the record should show that payment of compensation had been secured for appellant. The record shows just the opposite. Therefore, on the face of the record now before this court, appellant has the right given to him by Section 905 of Title 33, U.S.C.A., of the Longshoremen's and Harbor Workers' Act to bring an action for damages against his employer.

II. The Longshoremen's and Harbor Workers' Compensation Act, Supra, Is Not the Only Remedy Available to Appellant.

A. Historical Summary

Section 8, Article I, of the Constitution of the United States, empowers Congress "to regulate commerce with foreign nations and among the several states."

Section 2, Article III of the Constitution, provides "that the judicial power shall extend to all cases . . . of admiralty and maritime jurisdiction."

Congress, pursuant to these powers, passed the Judiciary Act of 1789, wherein Section 9 provides that the District Courts of the United States shall have exclusive original jurisdiction of all civil cases of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it."

The question of whether an individual state could provide a remedy for a person injured on navigable waters within that state received its first major consideration and determination in the United States Supreme Court in 1917 in *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086, and culminated in 1942 with the decision of *Davis v. Department of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

The *Jensen* case is of course a landmark. The deceased was operating a small electric freight truck, unloading onto a pier the cargo of a ship owned by the defendant. In attempting to back into the hatchway of the ship, he struck his head and was killed. The widow of the deceased made claim to the Workmen's Compensation Commission of the State of New York, which allowed her an award of compensation. The Southern Pacific Company appealed this decision, and eventually the Supreme Court held that the New York Workmen's Compensation Act was inapplicable to this employee.

The Workmen's Compensation Act of New York, as interpreted by the state court, required that no ship could load or discharge cargo at the docks without penalty unless complying with the state Act (61 L. Ed. 1097). Justice McReynolds stated at p. 1098:

"In view of these constitutional provisions and the Federal act, it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied."

Therefore, since the general maritime law can be modified or affected to some extent, the problem became one of a standard test to determine the limits of such modification. The general test to be made was stated by Justice McReynolds as follows:

“And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony or general uniformity of that law in its international or interstate relations.” (61 L. Ed. 1098)

In other words, the modification by state legislation is proper and constitutional unless it works material prejudice to the characteristic features of the general maritime law or interferes with the harmony and uniformity of that law. Because of the above provision of the Workmen's Compensation Act of New York, the court held that the necessary consequence of such provision would be destruction of the uniformity in respect to maritime matters which the Constitution was designed to establish and freedom of navigation between the states and foreign countries would be seriously hampered and impeded. Thus it was determined that the provisions of the New York Workmen's Compensation Act made too great a modification of the general maritime law, and under the facts before the Court at that time the state act was inapplicable to that employee.

In an attempt to put into statutory form what would or would not “work material prejudice to the characteristic features of the general maritime law” and with the

desire of removing uncertainty so that workers whose duties were partly on land and partly on navigable waters might be compensated for injuries, Congress passed an act five months after the *Jensen* decision, which stated “. . . save to claimant’s rights and remedies under the workmen’s compensation law of any state” (Approved October 6, 1917, ch. 97, 40 Stat. at L. 395 Comp. Stat. Sec. 991 (3), Fed Stat. Anno. Supp. 1918, p. 401). In other words, Congress attempted to make an addition to the savings clause, giving claimants who were injured under maritime circumstances the benefits of the workmen’s compensation laws of the individual states. This was declared unconstitutional in *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149, 64 L. Ed. 834, 40 S. Ct. 438, for the reason that it was beyond the power of Congress to sanction action by the states regarding rights, obligations and liabilities for injuries suffered while engaged in maritime employment.

In another attempt to solve the dilemma raised in the *Jensen* case, Congress passed the Act of June 10, 1922, ch. 216, 42 Stat. at L. 634, Comp. Stat., Sec. 991 (3), Fed. Stat. Anno. Supp. 1922, p. 225. In brief, this again was an attempt to broaden the savings clause to include rights and remedies under state workmen’s compensation laws, but to exclude the master of a ship and members of a crew. In *Washington v. W. C. Dawson*, 264 U.S. 219, 68 L. Ed. 646, 44 S. Ct. 302, the Supreme Court stated that this did not obviate the objections and Congress had again exceeded its powers.

Finally, on March 4, 1927, Congress passed the Long-

shoremen's and Harbor Workers' Compensation Act, ch. 509, Sec. 1, 44 Stat. 1424, 33 U.S.C.A. 901, et seq. In so doing, Congress made clear its purpose: to make the federal law applicable to an individual fact situation **ONLY IF** workmen's compensation proceedings could not validly be provided by the state law. Title 33, U.S.C.A., Sec. 903 (a) reads:

"Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

Leaving out the surplus words that do not affect the situation now before the court, said statute reads:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, . . . only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law."

Therefore, if in any given situation the state could constitutionally provide workmen's compensation benefits, then the federal compensation law is not applicable to that situation.

Thus the Supreme Court of the United States first propounded a test to determine the applicability of state remedies to workers injured on maritime waters. Thereafter Congress attempted to give to the states the right to legislate in this same area, but such attempts were declared unconstitutional. Consistent with its previous

efforts to give the individual states the broadest possible coverage in this area, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act, *supra*, which was specifically to apply only "if coverage . . . through workmen's compensation proceedings may not validly be provided by state law."

If the work in which appellant was engaged was of such an exclusively maritime nature that the state legislation would "work material prejudice to characteristic features of the general maritime law or interfere with the proper harmony or uniformity of that law", then workmen's compensation benefits by the State of Oregon could not validly be provided. However, if this particular work in which appellant was engaged at the time of the injury would not so interfere, then appellant may seek his remedy among those provided by the State of Oregon.

B. Rule of the Twilight Zone

Following the passage of the Longshoremen's and Harbor Workers' Compensation Act, there were a multitude of conflicting decisions on the question of whether an injured workman must seek his remedy exclusively within said Act, or whether he had a remedy constitutionally provided by an individual state. However, we feel it would be useless to discuss these decisions, for the Supreme Court of the United States in the case of *Davis v. Department of Labor & Industries of the State of Washington*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246, has superseded such prior decisions and is the source to

which we must go to determine the present state of the law.

It is pertinent to thoroughly analyze the decision in the *Davis* case. The deceased was a structural steel worker, employed to help dismantle an abandoned draw-bridge across a navigable river in the State of Washington. The steel was put in a barge and hauled away. Deceased was working on a barge examining the steel and cutting the pieces into proper lengths when he fell or was knocked into the river and drowned. Application was made by the widow to the Department of Labor & Industries of the State of Washington for compensation benefits and was denied by the State Supervisor, the Joint Board of the State Department of Labor & Industries, the State Superior Court and the State Supreme Court (Footnote, 87 L. Ed. 254). However, the Supreme Court of the United States reversed this judgment.

Justice Black first set forth the obvious purpose of Congress in passing the federal Longshoremen's and Harbor Workers' Act when he stated, at 87 L. Ed. 248:

“Congress made clear its purpose to permit state compensation protection whenever possible by making the federal law applicable only ‘if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by state law’ ”.

The court then stated that employees such as deceased occupy a “shadowy area within which, upon some undefined and undefinable point, state laws can validly provide compensation.” (87 L. Ed. 248)

“There is in the light of the cases referred to clearly a twilight zone in which the employees must have their rights determined case by case and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are as a matter of actual administration in fact protected under the state compensation act. *The yardstick to be used is the same yardstick created in the Jensen case. Does the state law interfere with the proper harmony and uniformity of maritime law?*” (87 L. Ed. 249) (Italics ours)

The court proceeded to discuss the actual impossibility for employees to determine with certainty before bringing action the factual question “Does applying the state law to their particular circumstances *interfere with the proper harmony and uniformity of maritime law?*” If the injured party, in attempting to make this determination, was in error, such party could easily suffer serious financial loss through the delay and expensive litigation and could very possibly discover that his claim had been barred by some statute of limitations (87 L. Ed. 249).

This reasoning is particularly pertinent to the case now before this court. Appellant was injured November 22, 1950 (R., p. 7). There is no contention that appellee was not notified. A complaint was filed on September 7, 1951 (R., p. 3), but the question now before us was not raised until September 23, 1952 (R., p. 15), almost two years after the injury. Appellant had never heard of the Longshoremen’s and Harbor Workers’ Compensation Act prior to the motion (R., p. 16). In other words, no notices that compensation had been secured under this law, as required by 33 U.S.C.A., 934, had been posted, and no compensation had been paid promptly

or within 14 days from the injury, as required by 33 U.S.C.A., 914. Nothing had been done, so far as dealing with the appellant was concerned, to comply with the requirements of the Longshoremen's and Harbor Workers' Compensation Act. It was for this reason that the Supreme Court of the United States in the *Davis* case stated:

“ . . . but the line separating the scope of the two (federal and state law) being undefined and undefinable with exact precision, marginal employment may by reason of particular facts *fall on either side.*” (Italics ours) (87 L. Ed. 250)

The fact that 33 U.S.C.A. 905 provides that the federal act is exclusive does not solve the problem, for, as the Supreme Court of the United States stated at 87 L. Ed. 250,

“That section gains meaning only after a litigant has been found to occupy one side or the other of a doubtful jurisdictional line, and is no assistance in discovering on which side he can properly be placed.”

This decision has again been considered by the Supreme Court of the United States on two occasions. In *Baskin v. Industrial Accident Commission, et al.*, 97 Cal. App. 2d 257, 217 P. 2d 733, affirmed 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643, the California Court at first sought to distinguish the *Davis* case, but as a study of this litigation will show, the Supreme Court of the United States was very definite that *Davis v. Department of Labor & Industries*, *supra*, correctly states the law.

In the *Baskin* case the plaintiff was a materialman employed at a shipyard in California. Plaintiff was in-

jured while carrying planks, when he fell into the hold of a ship that was being repaired. The work on the ship was being done under a maritime contract (217 P. 2d 735). In the earlier decision, *Baskin v. Industrial Accident Commission, et al.*, 89 Cal. App. 2d 632, 201 P. 2d 549, the same court had held the *Davis* case was inapplicable because *Davis* was a structural steel worker employed by a contractor, while *Baskin* was a materialman employed by a shipyard (201 P. 2d 552). The Supreme Court of the United States granted certiorari in 338 U.S. 854, 70 Sup. Ct. 99, 94 L. Ed. 523, and remanded the cause once again to the Colifornia court, stating:

“The petition for writ of certiorari is granted. It appears that the decisions of this Court in *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 93 L. Ed. 417, 69 S. Ct. 239, affirming the decision of the Supreme Judicial Court of Massachusetts, 323 Mass. 162, 80 N.E. 2d 478, was not available to the District Court of Appeal at the time of its consideration of this cause. The judgment is vacated and the cause remanded to the District Court of Appeal for reconsideration in the light of *Bethlehem Steel Co. v. Moore* (U.S.) *supra*, and *Davis v. Department of Labor & Industries*, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225.”

Thus a shipyard worker carrying planks aboard a ship, who fell in a hold of the ship, was permitted to enjoy the benefits of the state compensation act. Although the lower court distinguished the *Davis* case, the Supreme Court of the United States specifically remanded the case for a decision NOT distinguished from the *Davis* case. If a materialman employed by a shipyard carrying planks aboard a ship and falling into a hold is

in the twilight zone, certainly a laborer employed by a lumbermill who was merely placing a set of blocks on a barge is no less in the twilight zone.

Moore's case, 323 Mass. 162, 80 N.E. 2d 478; certiorari denied, *Bethlehem Steel Co. v. Moore*, 335 U.S. 874, 69 S. Ct. 239, 93 L. Ed. 417, is a recent case which further solidifies the decision in *Davis v. Department of Labor & Industries*, supra. Claimant was employed as a rigger in a shipyard. His work was variously on piers, dry docks and ships. A 475-foot tanker was towed to the shipyard for repairs and was tied to a floating dry-dock at the time of the accident. Claimant slipped on the step of a gun mount, and the injuries resulting gave rise to the litigation. Claimant sought compensation under the Workmen's Compensation Law of the state of Massachusetts, and the question was whether he was precluded because it was a maritime injury. The court, at 80 N.E. 2d 479, declared that under earlier decisions of the Massachusetts state court and of the United States Supreme Court claimant would undoubtedly be precluded from obtaining compensation in any manner other than under the Longshoremen's and Harbor Workers' Compensation Act. However, the decision of *Davis v. Department of Labor & Industries*, supra, completely altered the law on this point.

"But the situation was definitely altered by the decision of the Supreme Court of the United States in *Davis v. Department of Labor & Industries* of Washington, 317 U.S. 249, 63 S. Ct. 85, 87 L. Ed. 246, written by Mr. Justice Black in 1942. . . . The significance of the case, however, lies in its obvious attempt to set up a means of escape from the diffi-

culties involved in drawing the line between state and federal authority under the doctrine of the Jensen case." (80 N.E. 2d 480)

.

"The decision does not overrule the Jensen case. It does, however, at least as appraised by Mr. Justice Frankfurter who concurred in it and by Chief Justice Stone who dissented from it, create a 'twilight zone,' or an area of doubt within which the two acts overlap and the injured workman may recover under either of them." (80 N.E. 2d 480)

"Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and designed to include within a wide circle of doubt all waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other."

This decision was found to be correct by the Supreme Court of the United States, for in refusing certiorari it referred specifically to the *Davis* case as the authority for refusing the certiorari.

It should be noted in analyzing these two cases whose result depends on the *Davis* decision, that the refusal to apply the state compensation act was reversed by the Supreme Court of the United States and the *Davis* case cited as the reason, while the decision permitting the

application of the state compensation act was affirmed and the *Davis* case again cited as the reason.

When compared to the activities of the claimants in the above cited cases, appellant's activities were clearly within the twilight zone. In *Davis v. Department of Labor & Industries*, supra, the deceased was actually working on the barge, cutting and sorting steel from a dismantled bridge. Appellant's sole duty was to place a pair of wooden blocks; *this he had already completed*; and was walking away at the time of the accident (R., p. 7). In *Baskin v. Industrial Accident Commission, et al.*, supra, claimant was a materialman actually transporting planks on a ship at the time he was injured. The claimant in *Moore's* case, supra, was a rigger whose occupation necessitated his frequently going aboard and working on ships. In both of the last cited cases the employer was a shipyard, while appellant's employer is a sawmill. It has been determined by the Supreme Court of the United States that a sawmill employing men exclusively on navigable waters has only an incidental relation to navigation and commerce so far as those men are concerned and does not impinge on the admiralty and maritime jurisdiction.

Sultan Railway & Timber Company v. Department of Labor & Industries of Washington
and

Eclipse Mill Company v. Department of Labor & Industries of Washington,

277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

Both cases were heard together. The question presented was whether an order by the Department of

Labor & Industries requiring the employers to report the number of men so employed, the wages paid to them, and requiring payments to the State Workmen's Compensation fund was invalid because it conflicted with the Constitution and laws of the United States, in that it impinges on the admiralty and maritime jurisdiction of the United States.

One employer conducted a logging operation and employed the men in question to put sawlogs that were already in a navigable river into booms so that they could be towed elsewhere for sale; the other employer operated a lumber mill on the banks of a navigable river and employed the men in question to take booms apart before the logs entered the mill. The court said, at 72 L. Ed., page 821:

“ . . . In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other, after the transportation is completed.

“It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity.”

C. *Remedy Sought Is Proper*

Appellant brought an action directly against his employer for damages. It may be contended that no workmen's compensation proceedings are provided by state

law for this appellant, and that therefore his only remedy is found in the provisions of the Longshoremen's and Harbor Workers' Compensation Act, supra. In the first place, the Longshoremen's and Harbor Workers' Act, supra, is applicable only if "workmen's compensation proceedings MAY not validly be provided by state law." It is not applicable merely because such proceedings ARE not available. If the state MAY constitutionally provide such proceedings, the Longshoremen's and Harbor Workers' Compensation Act is not applicable and the remedy provided by the state is proper so long as it does not work material prejudice to the characteristic features of the maritime law. Secondly, appellee IS attempting to use one of the workmen's compensation proceedings provided by the State of Oregon.

The State of Oregon, of course, does have a Workmen's Compensation Act that is applicable in this case. (O.C.L.A. 102-1701 et seq.) Section 102-1712, O.C.L.A., provides that "all persons, firms and corporations engaged as employers in any of the hazardous occupations hereafter specified shall be subject to the provisions of this Act. . . ." Operating a lumbermill is described as a hazardous occupation in Section 102-1725 (c), O.C.L.A. Therefore, appellant was an employee in a hazardous occupation and his employer is subject to the provisions of the Workmen's Compensation Act.

Even though this employer is subject to the provisions of the Workmen's Compensation Act, it may avoid certain obligations and lose certain benefits by filing a written notice of rejection with the Commission (Sec.

102-1712, O.C.L.A.), which privilege was exercised by this employer. However, even though such a rejection notice is filed, the employer is always subject to the provisions of the Act, even if to a lesser extent. Proof of this is contained in Section 102-1713, O.C.L.A., which takes from employers who have filed such an election the common law defenses and such employers may be sued directly. It is this section that gives appellant the right to bring the action now before this Court. By filing the notice of rejection, the appellee is not required to contribute any sum into the industrial accident fund, but if negligent, must answer in damages to the injured person and does not have certain defenses available to it.

The Longshoremen's and Harbor Workers' Compensation Act is applicable only if "recovery for disability through workmen's compensation proceedings may not validly be provided by state law." Such proceedings were validly provided by state law, and appellant is claiming damages under one of the proceedings so provided.

Even if no such proceeding was made available to the appellant by the Workmen's Compensation Act, this action would be a proper one since the very wording of the Longshoremen's and Harbor Workers' Compensation Act limits the exclusive applicability of that Act to a situation where no state compensation law could apply, and since from the cases above cited, it is clear that a state compensation law could apply to this situation the federal act is not then the only remedy applicable.

In Oregon an employer is given his choice of whether or not he wishes to contribute to the state accident fund. If he chooses not to so contribute, all employees are deprived of benefits available under the Workmen's Compensation Act of this state, but are given certain advantages set forth above in bringing an action for damages against the employer. Surely the employer cannot reject the Workmen's Compensation Act and thereby deprive the employees of compensation benefits under said Act and by the same rejection deprive the employees of a right to bring an action for damages which is specifically given by the same Act.

CONCLUSION

1. In a much disputed decision the Supreme Court of the United States held in *Southern Pacific Company v. Jensen*, supra, that a remedy provided by a state is inappropriate if it works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law.

2. Congress attempted twice to adopt a statute permitting state workmen's compensation laws to apply to injuries occurring on navigable streams; such statutes were declared to be too broad and interfered with the above test laid down in the *Jensen* case.

3. Congress finally passed the Longshoremen's and Harbor Workers' Compensation Act, which limited the applicability of the federal law as compared to state remedies as much as it possibly could.

4. The Davis case has settled the conflicting cases that arose following the passage of the Longshoremen's and Harbor Workers' Compensation Act by again applying the rule set forth in the *Jensen* case.

Thus, the present state of the law is:

- (a) If the injury is caused by a tort occurring on navigable waters on a vessel exceeding 18 tons and to apply a remedy provided by a state would work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity

of that law, then the only remedy is the Long-shoremen's and Harbor Workers' Compensation Act.

- (b) If the injury occurred on shore, of course the remedies provided by the state would be the only ones available.
- (c) If the injury occurred on navigable waters but to apply a state remedy would not work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law, then a "twilight zone" exists and the injured party may seek the remedy in either area.

5. The remedy sought by appellant is a proper one and validly provided for by the Workmen's Compensation Act of the State of Oregon.

For the reasons set forth above, we ask this Court to absolve the order granting the summary judgment and remand the case to the United States District Court for the District of Oregon for trial.

Respectfully submitted,

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Attorneys for Appellant.



No. 13883

In the

**United States Court of Appeals
For the Ninth Circuit**

LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,
Appellee.

Brief for Appellee

Upon Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

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No. 13883

In the

**United States Court of Appeals
For the Ninth Circuit**

LESLIE H. CHAPPELL, *Appellant*,

vs.

C. D. JOHNSON LUMBER CORPORATION, *Appellee*.

Brief for Appellee

Upon Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, *Judge*

STATEMENT OF THE CASE

It is admitted that appellant was injured in the course of his employment aboard a vessel in excess of 18 tons upon the navigable waters of the United States while engaged in the work of loading the vessel with cargo (R. 26-27).

Appellant was employed as a spotter to set blocks aboard barges on which were placed crane loads of lumber being loaded from appellee's mill dock onto barges in the cargo slip of the mill dock (R. 7). Appellant

had been working as a spotter on barges approximately 2½ months at the time of the accident November 22, 1950 (R. 23). Just before the accident appellant was at the center of the barge, which was approximately 40 or 50 feet wide, and about a third of the way down toward the inshore end of the barge. He got down on the floor of the barge when the crane operator placed the load, and when the crane operator released his load appellant hopped back up and had walked 10 or 12 feet when the crane operator moved without raising his tongs high enough and the tongs of the crane bumped appellant (R. 23).

Action was commenced September 7, 1951 (R. 12), by appellant to recover damages under the Employers' Liability Act of Oregon (O.C.L.A., Section 102-1601, et seq), alleging under the "and generally" clause of that act that appellee had failed "to use every device, care and precaution practicable" (R. 9). As shown by the transcript of docket entries certified by the clerk of the district court (R. 24), on appellant's motion it was ordered that trial be postponed until appellant's condition became stationary, and no proceedings were then had until appellant gave deposition testimony September 2, 1952 (R. 23). On September 23, 1952, appellee moved for summary judgment (R. 15-16). After hearing the court found (R. 18-19):

“I.

“Defendant is a corporation organized and existing under and by virtue of the laws of Nevada, and is operating a sawmill at Toledo, Oregon, where defendant manufactures, handles and loads lumber products, a portion of which is moved by water.

“II.

“At all times herein material defendant’s lumber carriers deposited loads of lumber on blocks on defendant’s sawmill dock in the Yaquina River. By means of an overhead monorail crane, defendant picked up lumber from the sawmill dock and loaded the lumber on barges in the cargo slip at defendant’s dock. When loaded the barges were moved on the Yaquina River by tugboats.

“III.

“Plaintiff was employed by defendant as a ‘spotter’ in the loading of barges. Plaintiff’s work was upon the barges being loaded in the cargo slip, and his particular duty was to set and keep straight the blocks on the deck of the barge onto which the lumber was loaded by the crane. On or about November 22, 1950, plaintiff was aboard a barge upon the navigable waters of the United States, and he sustained injuries arising out of and in the course of his employment while the barge was being loaded with cargo. Specifically, plaintiff in his complaint contends: ‘that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was

walking away, the tongs of the crane struck plaintiff in the back, causing severe and serious injuries * * *.' Plaintiff was not a master or member of a crew of any vessel. The barge aboard which plaintiff was injured was a vessel of over 18 tons net and of approximately 200 tons net.

“IV.

“At all times herein material defendant was an employer, some of whose employees, including plaintiff, were employed in maritime employment in whole or in part upon the navigable waters of the United States.”

The district court concluded (R. 19-20):

“I.

“When injured, plaintiff was engaged in maritime employment for his employer upon the navigable waters of the United States. Plaintiff’s injury occurred and arose out of and in the course of his employment aboard a vessel in navigable waters of the United States.

“II.

“Recovery for disability resulting from such injury through Workmen’s Compensation proceedings may not validly be provided by state law.

“III.

“The injury and disability of which plaintiff complains are exclusively within the coverage of the Longshoremen’s and Harbor Workers’ Compensation Act, 33 U.S.C., Section 901 et seq. Plaintiff can-

not maintain an action against defendant to recover damages for such injury under the Employers' Liability Act of the State of Oregon.

“IV.

“Defendant is entitled to summary judgment for the reason that the pleadings and admissions by stipulation of the parties show that there is no genuine issue as to any material fact necessary to a determination that the injury of which plaintiff complains is a matter within the federal maritime jurisdiction and within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.”

Appellant appeals from the order granting summary judgment, presenting two questions:

1. Does an employee, when injured while loading cargo aboard a vessel on the navigable waters of the United States under the circumstances of this case, have an election to proceed against his employer for damages under the Employers' Liability Act of Oregon in lieu of compensation under the Longshoremen's and Harbor Workers' Compensation Act?

2. Was it a necessary condition precedent to summary judgment that appellee assert and establish that it had secured the payment of compensation in the manner prescribed by the Longshoremen's and Harbor Workers' Compensation Act (Title 33, U.S.C.A., Section

932 (a)) in the absence of any allegation by appellant that appellee had not secured the payment of compensation?

SUMMARY OF ARGUMENT

I. The liability of appellee for payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act is exclusive and in place of all other liability to appellant. The "twilight zone" of overlapping state and federal jurisdiction does not extend to an injury under the circumstances with which we are here concerned.

(A) Appellant was engaged in work which is traditionally maritime in nature and exclusively within the federal maritime jurisdiction.

(B) Appellant is not seeking Workmen's Compensation under a state act, but is seeking to recover damages under the state Employers' Liability Act for a maritime tort.

II. Appellee was entitled to summary judgment without having proved that it had complied with all or any of the provisions of the Longshoremen's and Harbor Workers' Compensation Act because appellant's rights and remedies are exclusively under that Act and he has not shown himself entitled to proceed with an action for damages under that Act.

ARGUMENT

I

The liability of appellee for payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act is exclusive and in place of all other liability to appellant. The "twilight zone" of overlapping state and federal jurisdiction does not extend to an injury under the circumstances with which we are here concerned.

(A) Appellant was engaged in work which is traditionally maritime in nature and exclusively within the federal maritime jurisdiction.

The line of division between federal admiralty and maritime jurisdiction reserved under Article III, Section 2, of the Federal Constitution and the jurisdiction of a state with respect to an injured workman was first established in

Southern Pacific Co. v. Jensen (1917), 244 U. S. 205,
61 L. ed. 1086

It was there held that a state workmen's compensation act could not be applied to a stevedore injured on board a ship in navigable water. An historical review of the development of the law since the Jensen decision is set forth in the recent decision of this court in

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952),
198 F. (2d) 409, 413 et seq

Following the Jensen decision, Congress made two attempts to extend state compensation laws to waterfront employees and each act was declared unconstitutional.

Knickerbocker Ice Co. v. Stewart (1920), 253 U. S. 149, 64 L. ed. 834

Washington v. W. C. Dawson & Co. (1924), 264 U. S. 219, 68 L. ed. 646

Congress then enacted the Longshoremen's and Harbor Workers' Compensation Act, and in limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law" Congress had in view the decisions of the Supreme Court with respect to the scope of the exclusive federal authority.

Crowell v. Benson (1932), 285 U. S. 22, 76 L. ed. 598

Congress accepted the Jensen line of demarcation between state and federal jurisdiction.

Parker v. Motor Boat Sales (1942), 314 U. S. 244, 86 L. ed. 184

This was again stated in

Davis v. Department of Labor and Industries (1942), 317 U. S. 249, 87 L. ed. 246

and most recently the Supreme Court said in

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

that New York could not have enacted statutes granting compensation for a freight brakeman's injury on navigable water aboard a car float, stating that the Jensen line of demarcation between state and federal jurisdiction has been accepted and a quarter of a century of experience has not caused Congress to change the plan.

After the Jensen decision and before the enactment of the Longshoremen's and Harbor Workers' Compensation Act, there was recognized commencing in 1922 the "local concern" doctrine, permitting the application of state compensation acts where neither the employee's general employment nor his activities at the time had any direct relation to navigation or commerce.

Grant Smith-Porter Ship Co. v. Rohde (1922), 257 U. S. 469, 66 L. ed. 321 (carpenter on partially completed vessel)

Miller's Indemnity Underwriters v. Boudreaux (1926) 270 U. S. 59, 70 L. ed. 470 (diver removing timbers from navigable river)

Alaska Packers Association v. Industrial Accident Commission of California (1928), 276 U. S. 468, 72 L. ed. 656 (fisherman endeavoring to push a stranded boat into navigable water)

Sultan Railway & Timber Company v. Dept. of Labor, etc., of Washington, and Eclipse Mill

Company v. Dept. of Labor, etc., of Washington (1928), 277 U. S. 136, 72 L. ed. 820 (workmen engaged in rafting and booming saw logs)

As stated by this court in

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952), 198 F. (2d) 409, 414

“This local concern doctrine was in vogue until *Parker v. Motor Boat Sales*, 1941, 314 U. S. 244, 62 S. Ct. 221, 86 L. ed. 184, where, to an employment situation whose maritime aspects were of an obviously incidental nature, the Supreme Court refused to apply the ‘local concern’ rule and held that the death of the claimant-janitor fell within the scope of the Longshoremen’s Act and not within the purview of the state compensation law.

“It was upon such an uncertain foundation that *Davis v. Department of Labor and Industries*, 1942, 317 U. S. 249, 256, 63 S. Ct. 225, 229, 87 L. ed. 246, was superimposed. Mr. Justice Black, speaking for the majority, espoused a new formula when he stated:

“ ‘There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. *That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act.* ’ ” (emphasis added)

In the Davis case petitioner's husband was a structural steelworker working for a construction company which was a contributor to the Workmen's Compensation Fund of the State of Washington. Decedent was engaged in the job of dismantling an abandoned draw-bridge which spanned the Snohomish River. Steel was cut from the bridge with torches and moved "about 250 feet away for storage there to await delivery to a local purchaser." The steel when cut from the bridge was lowered to a barge by a derrick, and the barge when loaded was to be towed or hauled the 250 feet to the storage point. Deceased had helped to cut some steel from the bridge, and had gone on the barge where "His duty appears to have been to examine the steel after it was lowered to the barge and, when necessary, to cut the pieces to proper lengths." From the barge he fell or was knocked into the stream and was drowned. In reversing the decision of the Washington Supreme Court that the state could not, consistently with the Federal Constitution, make a compensation award to Mrs. Davis, Justice Black's opinion states (87 L. ed. 248):

"Harbor workers and longshoremen employed 'in whole or in part upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in

advance of litigation, and has held that the margins of state authority must 'be determined in view of the surrounding circumstances as cases arise.' *John Baizley Iron Works v. Span*, 281 U. S. 222, 230, 74 L. ed. 819, 821, 50 S. Ct. 306."

The doctrine of the Davis case has been clarified by recent decisions.

Moore's Case (1948), 323 Mass. 462, 80 N. E. (2d) 478, affirmed 335 U. S. 874, 93 L. ed. 417

The Supreme Judicial Court of Massachusetts affirmed an award of state compensation to a workman employed as a rigger in a shipyard who directed the movement of material by cranes from piers on land to dry docks or ships under repair. The major portion of his work was on the piers, but occasionally he went aboard vessels. When injured he had gone aboard a vessel under repair to get where his crane operator could see him so that he could give signals. The Massachusetts court reviewed decisions establishing the proposition that a repair job on a previously completed vessel was within federal jurisdiction even though the repairs required a long period and entirely changed the character of the vessel, whereas a different rule prevails if the work is being done on a new vessel, and even though on navigable water such work remains within state jurisdiction. As a result of the Davis case the Massachusetts

court stated that, although some heed must be paid to the Jensen line between state and federal authority, the most important question has now become the fixing of the boundaries of the new "twilight zone."

"Probably therefore our proper course is not to attempt to reason the matter through and to reconcile previous authorities, or to preserve fine lines of distinction, but rather simply to recognize the futility of attempting to reason logically about 'illogic,' and to regard the Davis case as intended to be a revolutionary decision deemed necessary to escape an intolerable situation and as designed to include within a wide circle of doubt all water front cases *involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way*, even though a careful examination of numerous previous decisions might disclose an apparent weight of authority one way or the other. We can see no other manner in which the Davis case can be given the effect that we must suppose the court intended it should have, and we must assume that the court intends to follow that case in the future.

"We are the more inclined to include within the twilight zone the case of a workman *engaged in an ordinary land occupation* although occasionally going upon a dry dock or vessel to make repairs because in the latest case of that particular type decided in the Supreme Court of the United States, *John Baizley Iron Works v. Span*, 281 U. S. 222, 50 S. Ct. 306, 74 L. ed. 819, although the case was held to be one exclusively of Federal cognizance, three of the justices dissented, and Mr. Justice Black in his opinion in the Davis case refers to the Baizley Iron Works case as if it were one of those responsible for the existing confusion. Moreover, the distinction be-

tween working on navigable water in repairing a previously completed vessel and doing precisely the same work on navigable water upon a vessel in process of construction may be thought a narrow one of doubtful practical validity." (emphasis added) (80 N. E. (2d) 481)

The California District Court of Appeal affirmed the denial of state compensation to a shipyard workman employed entirely on shore or on ships under construction who was injured while on an isolated occasion at work aboard a ship under repair assisting in repairs.

Baskin v. Industrial Accident Commission (Cal., 1949), 201 P. (2d) 549

The Supreme Court of the United States, after affirming *Moore's Case*, supra, reversed the California District Court of Appeal in

Baskin v. Industrial Accident Commission of California (1949), 338 U. S. 854, 94 L. ed. 62

upon the authority of the *Davis* case and *Moore's Case*. The decision of the California court after reversal is

Baskin v. Industrial Accident Commission (Cal., 1950), 217 P. (2d) 733

The Supreme Court has evidenced its intention to abandon the earlier distinction between shipyard work-

ers engaged in new construction and shipyard workers engaged in repair or conversion work.

DeGraw v. Todd Shipyards Co. (N.J., 1946), 47 A. (2d) 338 (certiorari denied (1946) 329 U. S. 759, 91 L. ed. 655)

The latest decision of the Supreme Court in

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

required a determination as to whether the Federal Employers' Liability Act or the Longshoremen's and Harbor Workers' Compensation Act applied in the case of an injury to a freight brakeman injured while at work releasing hand brakes on railroad cars aboard a car float. In determining that the Longshoremen's and Harbor Workers' Compensation Act was applicable, the court said that that Act extended to injuries which were beyond the reach of state jurisdiction, and that under the Jensen line of demarcation New York could not have enacted statutes granting compensation for O'Rourke's injury on navigable water. The Supreme Court clearly went on to hold that it is not necessary that there be both injury on navigable water and maritime employment as a ground for coverage under the Longshoremen's and Harbor Workers' Compensation Act—the

mere locus of the accident necessarily determines the right. The court referred to its decision in

Nogueira v. New York, N.H. & H.R. Co. (1930), 281 U. S. 128, 74 L. ed. 754

for the proposition that the application of the Longshoremen's and Harbor Workers' Compensation Act was made to depend on whether injury occurred upon navigable waters and recovery therefore could not validly be provided by a state compensation statute. Denying the applicability of any "duties test" based on a consideration of whether various types of construction and service workers were engaged in traditional maritime employment, the court made the following footnote reference:

"*Davis v. Department of Labor & Industries*, 317 U. S. 249, 87 L. ed. 246, 63 S. Ct. 225, is an illustration of the difficulty encountered in applying this standard, happily not present in the case at bar. The Davis case avoided uncertainty in areas where state and federal statutes might overlap. In the present case we have two federal statutes and a line marking their coverage can be drawn." (Footnote 8, 97 L. ed.) (Advance p. 267)

One can now logically conclude that the twilight zone of overlapping state and federal jurisdiction covers injuries to various types of construction and service workers engaged in an ordinary land occupation

and not engaged in traditional maritime employment whose work, as stated in *Moore's Case*, *supra*, involves "aspects pertaining both to the land and to the sea where a reasonable argument can be made either way" and where, as stated in the *Davis case*, the workman is "as a matter of actual administration, in fact protected under the state compensation act."

The work of loading or unloading a vessel in navigation or commerce upon the navigable waters of the United States is and always has been considered maritime employment and not a matter of purely local concern. Such work has a direct relation to commerce and navigation, and state workmen's compensation proceedings may not validly be made applicable thereto.

Atlantic Transport Co. v. Imbrovek (1914), 234 U. S. 52, 58 L. ed. 1208

Southern Pacific Co. v. Jensen (1917), 244 U. S. 205, 61 L. ed. 1086

Northern Coal & Dock Co. v. Strand (1928), 278 U. S. 142, 73 L. ed. 232

Nogueira v. New York, N.H. & H.R. Co., *supra*

Employers' Liability Assur. Corp. v. Cook (1930), 281 U. S. 233, 74 L. ed. 823

Minnie v. Port Huron Terminal Co. (1935), 295 U. S. 647, 79 L. ed. 1631

South Chicago Coal & Dock Co. v. Bassett (1940), 309 U. S. 251, 84 L. ed. 732

Pennsylvania Railroad Co. v. O'Rourke (1953), 344 U. S. 334, 97 L. ed. (Advance p. 262)

After a consideration of appellant's work in the instant case, we submit that it necessarily follows, as concluded in the opinion of the district court:

“In my opinion the loading of a barge of 18 tons or more in navigable water is maritime in nature and injuries of a workman employed on such a barge are likewise maritime, and the rights and liabilities of the parties in connection therewith are clearly within the admiralty jurisdiction and outside the reach of State compensation laws. *Southern Pacific v. Jensen*, 1916, 244 U. S. 205, 37 S. Ct. 524, 61 L. ed. 1086.

“Although I appreciate the fact that the Jensen case has been criticized and distinguished on many occasions, the Supreme Court of the United States, in the recent case of *Pennsylvania Railroad Company v. O'Rourke*, 344 U. S. 334, 73 S. Ct. 302, 304, has found: ‘The “Jensen line of demarcation between state and federal jurisdiction” has been accepted,’ and the Court cited the Nogueira case with approval.

“In my view, the facts of this case do not bring plaintiff within the twilight zone between State and Federal jurisdiction but clearly within Federal jurisdiction, and I therefore find that plaintiff may not maintain his action in this Court but must seek his remedy under the provisions of the Longshoremen's and Harbor Workers' Compensation Act.” (*Chappell v. C. D. Johnson Lumber Corp.* (D. C. Ore., 1953), 112 F. Supp. 625, 626)

- (B) Appellant is not seeking workmen's compensation under a state act, but is seeking to recover damages under the State Employers' Liability Act for a maritime tort.

As already noted, in restricting the Act to the area where recovery through workmen's compensation proceedings may not validly be provided by state law, Congress had in mind the Jensen case, the Knickerbocker Ice Co. case and the *Washington v. W. C. Dawson & Co.* case and intended to cover all maritime workers with compensation, either under the federal act or the state compensation acts, along the Jensen line of demarcation. As stated by the district court:

“Even if plaintiff's work was within the penumbra where State and Federal authority overlap, in my opinion the only alternative is coverage under State Compensation. The Act was designed to protect injured workmen in hazardous occupations without regard to fault. The rationale and history of the Act as set forth in the Davis and Nogueira decisions require this interpretation of section 3.

“In this case, state compensation was not available to the plaintiff for the reason that the employer elected not to come under the Oregon Workmen's Compensation Law. Plaintiff therefore seeks to enforce a common-law remedy predicated on his employer's fault. The choice here is not one between State and Federal compensation as it was in the Davis case. In my opinion, this alternative is not available to plaintiff for Congress only exempted seamen, at their own request, from automatic coverage and did not give harbor workers the same privilege. The Act is automatic except in the limited cir-

cumstances provided for in the Act. Coverage under a State Workmen's Compensation Law is necessary to avoid automatic coverage under the Act.

"Since plaintiff was not covered under the Oregon law, it makes no difference whether, at the time of the accident, he was in an exclusively Federal area or within the twilight zone." (*Chappell v. C. D. Johnson Lumber Corp.*, *supra*, pp. 626-627)

Section 3 (a) of the Act (33 U.S.C.A., Section 903 (a)) reads in pertinent part as follows:

"Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

If the language of the Act had the meaning ascribed by appellant so as to permit recovery of damages under employers' liability acts in any situation where the state could constitutionally legislate to provide workmen's compensation benefits, then the words "through workmen's compensation proceedings" could have been omitted and the statute would have read "* * * if recovery for the disability or death may not validly be provided by State law." Enactment of a workmen's compensation

act by a state was obviously not intended as the measure of a state's jurisdiction. Recovery through workmen's compensation proceedings was a condition upon the limited encroachment by states into the federal maritime jurisdiction within the lines drawn by the Jensen case.

II

Appellee was entitled to summary judgment without having proved that it had complied with all or any of the provisions of the Longshoremen's and Harbor Workers' Compensation Act because appellant's rights and remedies are exclusively under that Act and he has not shown himself entitled to proceed with an action for damages under that Act.

Section 5 of the Act (33 U.S.C.A., Section 905) reads as follows:

“The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may

not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.”

The inconsistency in appellant's argument on this point is shown by the fact that in this appeal he is at the same time claiming the right to proceed under the quoted section of the Act with his action for damages, and also claiming that the Act does not apply and that he is privileged to proceed with a damage action afforded by the Oregon Employers' Liability Act. Appellant has never asserted that appellee did not secure the payment of compensation under Section 32 (33 U.S.C.A., Section 932) of the Act. He simply complains that appellee did not prove that such security for compensation existed and appellee was therefore not entitled to summary judgment.

If appellant seeks the benefit of the statutory exception contained in Section 905, *supra*, it is well settled that he must bring himself within its terms by pleading and proof. This he has not done.

Canadian Pac. Ry. Co. v. United States (CCA 9, 1934), 73 F. (2d) 831

Reynolds v. Salt River Valley Water Users Assn. (CCA 9, 1944), 143 F. (2d) 863

Aragon v. Unemployment Compensation Commission of Territory of Alaska (CCA 9, 1945), 149 F. (2d) 447

Without an allegation that appellee had failed to secure compensation, appellant has stated no cause of action against appellee under the Longshoremen's and Harbor Workers' Compensation Act and appellee was not obliged to prove that it had in fact secured compensation. As stated by the Court of Appeals for the Third Circuit under similar circumstances:

"Thus, it would appear that the plaintiff, on her own view, has brought herself directly within the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., § 901, et seq. Consequently, the plaintiff would have no cause of action in the District Court against Atlantic, the decedent's employer, unless she were to have asserted and proved that Atlantic failed to comply with the statute. * * * if it were a maritime tort action she can only proceed under the Longshoremen's and Harbor Workers' Compensation Act." (*Gladden v. Stockard S. S. Co.* (CA 3, 1950), 184 F. (2d) 510, 512)

The opinion of the district court properly answers appellant's contention on this appeal.

"As a subsidiary point, the plaintiff alleges that the defendant failed to show that it secured the payment of compensation as required by § 5 of the Act, 33 U.S.C.A. § 905. Defendant has indicated its will-

ingness to prove that, at the time of the accident, it had complied with all the requirements of the Act. If it desires, defendant can avail itself of that opportunity. However, in my view, the failure to comply with this section does not give an injured workman the privilege of filing a common-law action or an action under the Oregon Employers' Liability Act for injuries. The workman's remedy is limited to maintaining the type of action provided for in the Act itself. See *Nogueira v. New York, New Haven & Hartford Railroad Co.*, 281 U. S. 128, 137, 50 S. Ct. 303, 74 L. ed. 754." (*Chappell v. C. D. Johnson Lumber Corp.*, *supra*, p. 627)

CONCLUSION

The twilight zone of overlapping state and federal jurisdiction covers injuries to various types of construction and service workers engaged in an ordinary land occupation and not engaged in traditional maritime employment whose work involves aspects pertaining both to the land and to the sea, where a reasonable argument can be made either way and where as a matter of actual administration the workman is in fact protected under the state compensation act. Under this rule state compensation may now be afforded to shipyard workers engaged in ship repair as well as new construction and to construction workers engaged in such work as the dismantling and removing of a bridge. The Jensen line of demarcation leaves it unequivocally clear that an employee engaged regularly as a spotter in loading

lumber cargo aboard a vessel of more than 18 tons on the navigable waters of the United States when injured while so engaged aboard the vessel is within the exclusive coverage of the Longshoremen's and Harbor Workers' Compensation Act. To hold otherwise would extend state jurisdiction over all longshoremen and harbor workers in an all-inclusive twilight zone with no line of demarcation.

If appellant proceeds under the Longshoremen's and Harbor Workers' Compensation Act his complaint for damages under that Act must bring him within the statutory exception by alleging that appellee has not secured payment of compensation as required by the Act. Without such allegation appellant clearly stated no claim against appellee upon which relief could be granted and appellee was entitled to summary judgment.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

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United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,

Appellant,

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

I. The Longshoremen's & Harbor Workers' Compensation Act is not the exclusive remedy available to appellant.

Appellee first argues that the Longshoremen's & Harbor Workers' Compensation Act is exclusive; that in this particular situation no state can constitutionally pass a compensation statute that would be applicable.

The basis of this contention is that appellant was loading a vessel and such activity automatically excludes the applicability of the "twilight zone" theory.

Nothing appears in the record to indicate that appellant was "loading" a vessel. He was an employee of a lumber mill, receiving the same pay as all laborers at the mill. When he was not working as a spotter, he worked exclusively ashore; when his job was that of a spotter, he was often on shore as well as on the barge (R. 16, 17). As a spotter, at the time of the accident his duty was to set wooden blocks on the barge and keep them straight (R. 7, 18). He did not load the barge or act as a longshoreman in any way.

The Supreme Court of the United States has held:

(1) Employees of a sawmill working exclusively on navigable waters may be regulated by local rules.

Sultan Railway & Timber Co. v. Department of Labor & Industries of Washington
and

Eclipse Mill Company v. Department of Labor & Industries of Washington.

277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

(2) An employee assisting in dismantling a draw-bridge, who was on a barge in navigable waters examining the steel and cutting it into proper lengths, was entitled to the benefits of the state compensation act.

Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246.

(3) A diver actually engaged in the removal of an obstruction to navigation was considered constitutionally within the purview of the law of an individual state.

Millers' Indemnity Underwriters v. Boudreaux (1926), 270 U.S. 59, 70 L. Ed. 470.

(4) A rigger employed by a shipyard and whose work was on ships, piers and drydocks was injured aboard ship on navigable waters and was permitted to pursue his state remedy.

Moore's Case, 323 Mass. 462, 80 N.E. 2d 478.

(5) A state compensation law was held applicable to a materialman employed by a shipyard pursuant to a maritime contract, injured aboard a ship on navigable waters.

Baskin v. Industrial Accident Commission, et al.,
97 Cal. App. 2d 257, 217 P. 2d 733, affirmed
340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

Appellee has cited no decisions holding that the federal law alone can apply where an employee was engaged in an occupation even remotely similar to that of appellant. A breakdown of the cases cited by appellee is as follows:

Atlantic Transport Co. v. Imbrovek (1914), 234
U.S. 52, 58 L. Ed. 1208;

Southern Pacific Co. v. Jensen (1917), 244 U.S.
205, 61 L. Ed. 1086;

Northern Coal & Dock Co. v. Strand (1928), 278
U.S. 142, 73 L. Ed. 232.

These cases all involve longshoremen.

Employers' Liability Assur. Corp. v. Cook (1930),
281 U.S. 233, 74 L. Ed. 823, involves a claimant whose
duties at the time of the accident, as well as at other
times, was that of a stevedore or longshoreman.

South Chicago Coal & Dock Co. v. Bassett (1940),
309 U.S. 251, 84 L. Ed. 732, involved only the question
of whether the injured party was a seaman.

Nagueira v. New York, N. H. & H. R. Co. (1930),
281 U.S. 128, 74 L. Ed. 754,

and

Pennsylvania Railroad Co. v. O'Rourke (1953),
344 U.S. 334, 97 L. Ed. (Advance p. 262),

are concerned with the applicability of the Longshoremen's & Harbor Workers' Compensation Act as opposed to the Federal Employers' Liability Act.

With the exception of *Pennsylvania Railroad Co. v. O'Rourke*, supra, appellee can cite no case after the date of the decision of *Davis v. Department of Labor & Industries*, supra, wherein the Longshoremen's & Harbor Workers' Compensation Act was held to be exclusively applicable. There just is no such case available. This one exception held that there IS a definite line dividing the respective coverages of the Longshoremen's & Harbor Workers' Compensation Act and the Federal Employers' Liability Act. The Court, at footnote 8 of 97 L. Ed. (Advance p. 267), specifically called attention to the fact that there was an overlapping between state and federal statutes, but not between the two federal statutes.

Appellee cites:

Parker v. Motor Boat Sales (1942), 314 U.S. 244,
86 L. Ed. 184,

and

Western Boat Bldg. Co. v. O'Leary (CA 9, 1952),
198 F. 2d 409,

as authority that the "local concern" doctrine has been abandoned by the Supreme Court of the United States. We submit that the holding in these two cases is merely that so long as the injury occurred on navigable waters

while engaged in a maritime activity, the federal law would be applicable if the injured party sought his remedy therein. In other words, merely because the employment was local in character does not oust the application of the federal law, but if such employment IS of local concern a remedy provided by a state would also be applicable.

In *Southern Pacific Company v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086,

the Court stated the test as follows:

Does it "work material prejudice to the characteristic features of the general maritime law, or interfere with the proper harmony or general uniformity of that law in its international or interstate relations"? (61 L. Ed. 1098)

In *Miller's Indemnity Underwriters v. Boudreaux* (1926), 270 U.S. 59, 70 L. Ed. 470,

and cases following, the words used were "local concern" or employment that was "so local in character." Justice Black, in

Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246,

called it the "twilight zone." We submit that these are different words to describe the same problem and the same result, namely, that if a party is injured on navigable waters in a manner wherein a state law would not interfere with the characteristic features of the general maritime law or if the employment is local in character or if the case falls within the twilight zone, that party may constitutionally seek his remedy among those provided by the individual state.

II. The remedy sought by appellant is a proper one.

Appellee next contends that appellant's only remedy is under the Longshoremen's & Harbor Workers' Compensation Act because he is seeking redress under the State Employers' Liability Act. This is not a true assumption. The complaint is drawn to state a cause of action either under the provisions of the Workmen's Compensation Act of the State of Oregon (Secs. 102-1712, 13, O.C.L.A.) or under the so-called Employers' Liability Act (Sec. 102-1601, et seq., O.C.L.A.).

Appellant's opening brief, pages 21, 22 and 23, contains the discussion of the right of appellant *as given to him by the Workmen's Compensation Act of the State of Oregon* to bring an action against his employer for damages (Section 102-1713, O.C.L.A.). The right given by this portion of the statute to the injured party is the right to sue the employer for common law negligence:

"Such employer shall be entitled to none of the benefits of this act and shall be liable for injuries to or death of his workman, which shall be occasioned by his negligence, default or wrongful act, as if this act had not been passed." (Sec. 102-1713, O.C.L.A.)

The same section of the Workmen's Compensation Act takes away from the employer the normal defenses available if the action was one given by the common law alone—fellow servant, contributory negligence and assumption of risk.

It cannot be disputed that an injured party may bring an action against his employer by filing a com-

plaint that is based both on common law negligence and on the Oregon Employers' Liability Act.

Thompson v. Union Fishermen's Co-op. Packing Company, 118 Or. 463, 273 Pac. 953,

involved the question of whether plaintiff was bringing an action for the death of a child as an administratrix under the common law or as a beneficiary under the Employers' Liability Act. The Court, at page 465, upon a rehearing of the question stated:

"While there are allegations in this complaint charging a violation of the Employers' Liability Act, there are other allegations charging a violation of a common-law duty, and hence it cannot as a matter of law be said that the right of action arose under the Employers' Liability Act and not under Section 380. *Under the issues made by the pleadings, whether the action should have been brought under one or the other of said statutes, presents a question of fact for the jury and not a question of law for the court.*" (Emphasis added)

To the same effect see

Montgomery Ward & Co. v. Hammer, 38 F. 2d 636,

where this court held that the defendant could not object to the trial court's instructing only on the Employers' Liability Act, but that the plaintiff might very well have had proper grounds for claiming that both common law negligence and Employers' Liability Act negligence should be submitted to the jury.

Hoffman v. Broadway Hazelwood, 139 Or. 519, 10 P. 2d 349, 11 P. 2d 814.

In the above case the lower court submitted to the jury the question of whether or not a bakery employee's

work involved risk and danger within the Employers' Liability Act and then further instructed that there was not sufficient evidence to prove common-law liability. On appeal the Supreme Court of Oregon held that this was an improper instruction and that as a matter of law the Employers' Liability Act was inapplicable, but that the court should have instructed regarding the rules of the common law (p. 526).

See also:

Fretti v. Southern Pacific Company, 154 Or. 97,
57 P. 2d 1280.

There is only one portion of appellant's whole complaint that tends to bring the action within the purview of the Oregon Employers' Liability Act. This is subsection 7 of paragraph IV (R. 9). All other allegations of negligence and all other portions of the complaint charge "negligence, default or wrongful acts," as Section 102-1713, O.C.L.A., in the Workmen's Compensation Act of the State of Oregon permits.

In claiming that, first, appellant could not proceed under a state compensation act at all, and second, that appellant is proceeding under a state employers' liability act, appellee refuses to face the legal fact that appellant IS proceeding under the provisions of the State Compensation Law. Three pages of appellant's brief set forth this argument, and nothing on this issue was cited by appellee to counter the argument.

Even assuming that this action was based exclusively on the Employers' Liability Act of Oregon (if the only allegation of negligence was subsection 7 of paragraph

IV) (R. 9), the granting of the motion for summary judgment would still be erroneous for appellant may seek his remedy among the laws provided by the state if workmen's compensation proceedings could validly be provided by the state.

Appellee's brief, at page 21, states:

"Recovery through workmen's compensation proceedings was a condition upon the limited encroachment by states into the federal maritime jurisdiction within the lines drawn by the Jensen case."

We know of no such authority. We know of no authority that holds that state workmen's compensation laws may encroach further on federal maritime jurisdiction than other state legislation. Appellee is asking the court to substitute the word "is" for three words, "may validly be", so that the statute would then read

"and if recovery for the disability or death through workmen's compensation proceedings IS not provided by state law."

This connotes a far different reading than the statute as it actually exists, which reads:

"and if recovery for the disability or death through workmen's compensation proceedings MAY NOT VALIDLY BE provided by state law." (33 U.S.C.A., § 903a.)

The statute can only mean what it says. If recovery through workmen's compensation proceedings may not validly be provided, then, and only then, is the federal act exclusively applicable.

III. Appellee failed to comply with the provisions of the Longshoremen's & Harbor Workers' Compensation Act.

Appellee contends that appellant must allege failure to secure compensation by appellee before he can proceed against his employer, as provided in 33 U.S.C.A., 905, which reads:

“The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.”

So there would be no misunderstanding, appellant assures this court that at the time the complaint was originally filed there was not the slightest intention of proceeding under this section of the Longshoremen's & Harbor Workers' Compensation Act, or any part thereof.

The injury occurred on November 22, 1950 (R. 7). The complaint was filed on September 7, 1951 (R. 12). The first time the Longshoremen's & Harbor Workers'

Compensation Act was mentioned was on September 23, 1952, almost two years from the date of the injury and more than one year from the time the complaint was filed. Appellee attempts to intimate that the only reason this point was not raised previously was that the deposition of appellant was not taken until September 2, 1952. However, there was absolutely nothing in the deposition on this issue that is not contained in the complaint (R. 23, 6).

The issue before this Court is whether a motion for summary judgment can properly be granted. Rule 56 (c) states:

“. . . the judgment sought shall be rendered forthwith if the *pleadings, depositions, and admissions* on file, together with the *affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (Emphasis added)

As argued in appellant's brief, pages 6 and 14, the affidavit (R. 16) shows noncompliance by the employer. Appellee does not contend that any portion of the Longshoremen's & Harbor Workers' Act was complied with, but only that appellant did not allege noncompliance. Appellee is in the position of

(1) Admitting the Workmen's Compensation Law of Oregon was rejected so that appellant could not avail himself of any compensation benefits thereunder;

(2) Stating that appellant's sole and proper remedy is within the Longshoremen's & Harbor Workers' Compensation Act, even though no attempt has been made to pay such compensation (Title 33, U.S.C.A. 914 (a))

or notify this employee or other employees that compensation was available (33 U.S.C.A 934).

Appellee cites three cases at page 22 of its brief to the effect that the injured party must plead the terms of the Longshoremen's & Harbor Workers' Compensation Act. None of these cases even remotely involves this legislation, but they are concerned with other completely foreign statutes.

Appellee also cites *Gladden v. Stockard S. S. Co.*, 184 F. 2d 510, 512, to the same effect. This case holds plaintiff must assert and prove noncompliance.

Appellant contends that his affidavit (R. 16) does assert noncompliance by appellee in every particular within his knowledge. The complaint sets forth an action at law for damages as permitted by 33 U.S.C.A. 905. This is the same action at law for damages permitted by the Oregon Workmen's Compensation Law under the conditions existing in this matter (Sec. 102-1713, O.C.L.A.).

CONCLUSION

- (1) The Longshoremen's & Harbor Workers' Act is not the exclusive remedy available to a laborer who is employed by a sawmill.

As stated in *Norton v. Warren Company*, 321 U.S. 565, 88 L. Ed. 931, 936.

"The Senate report makes clear that 'the purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly

employed in loading, unloading, refitting, and repairing ships.' S. Rep. No. 973, 69th Cong., 1st Sess. page 16."

Appellant was not a longshoreman in any sense or use of the word.

- (2) There was in existence in Oregon a state workmen's compensation act whose remedies were available to the appellant.

Since appellee chose not to contribute a percentage of the payroll to the industrial accident fund, this compensation law makes appellee liable in damages for its negligent conduct if the injured party chooses to bring an action.

- (3) The only records before the Court show that there is at least a "genuine issue" of whether or not appellee complied with the Longshoremen's & Harbor Workers' Compensation Act so as to avoid liability; and since this genuine issue exists, the granting of a motion for summary judgment was erroneous.

Respectfully submitted,

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BURL L. GREEN,

Attorneys for Appellant.



No. 13-883

United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER COMPANY,
Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court
for the District of Oregon.*

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United States
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LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER COMPANY,
Appellee.

PETITION FOR REHEARING

*Appeal from the United States District Court
for the District of Oregon.*

Pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, effective May 27, 1953, appellant respectfully petitions for a rehearing. The rehearing requested concerns that portion of the opinion dated November 22, 1954, which holds that the injury to appellant falls exclusively within the federal jurisdiction, and that his remedy is likewise exclusively within the federal jurisdiction.

I.

**The Mere Fact That Appellant's Injury
Occurred on Navigable Waters Does Not
Limit Appellant's Remedy to One
Provided by Federal Law.**

Volume 33, U.S.C.A., Sec. 903, specifically limits the Longshoremen's and Harbor Workers' Compensation Act to situations wherein state workmen's compensation proceedings may not be provided by state law. Since 1942 only three cases involving the application of state workmen's compensation proceedings to injuries upon navigable waters have been considered by the Supreme Court of the United States. These three cases are:

Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246;

Moore's Case, 323 Mass. 162, 80 N.E. 2d 478, (Bethlehem Steel Company v. Moore's, 335 U.S. 874, 93 L. Ed. 417, 69 S. Ct. 239), and

Baskin v. Industrial Accident Comm., et al., 89 Cal. App. 2d 632, 201 P. 2d 549, 338 U.S. 584, 94 L. Ed. 523, 70 S. Ct. 99, 97 Cal. App. 257, 217 P. 2d 733, 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

There have been no cases since 1942 which have held the Longshoremen's and Harbor Workers' Compensation Act was the *exclusive* remedy for an injury received on navigable waters when the injured party was seeking his remedy through workmen's compensation proceedings supplied by the individual state.

II.

There Is a Genuine Issue Between Appellant and Appellee of a Material Fact.

Rule 56 (c) of the Federal Rules of Civil Procedure provide that a summary judgment can be granted only if the pleadings, depositions, admissions on file and affidavits show that no genuine issue as to any material fact exists. It has long been held by the Supreme Court of the United States that the employee of a sawmill who was working *exclusively* on navigable waters has only an incidental relation to navigation and commerce.

Sultan Railway & Timber Co. v. Department of Labor & Industries of Washington and Eclipse Mill Company v. Department of Labor & Industries of Washington, 277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

Appellant in the case at bar was an employee of a sawmill and receiving the same pay as the laborers who worked in other portions of appellee's sawmill (R. p. 17). He sometimes worked exclusively on shore, and even in the performance of his duties as a spotter, his job was as much on shore as it was on the particular barge where he placed a set of blocks.

Before it can be stated as a matter of law that appellant's activities were strictly maritime within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, there are innumerable factors which could only appear by evidence adduced at the trial. For instance, it might become important to discover what

happens to the lumber on the barges after these barges are loaded on the mill premises. Are they merely taken to another portion of appellee's mill for further processing; are they left standing for any length of time in another portion of appellee's premises; are they reloaded onto a regular ship or larger vessel at appellee's premises or at some other place? It further becomes important to consider appellant's work and the amount of time that he spends actually on the barge, as compared to the time spent on other parts of the appellee's premises. Mere presence on a barge on navigable waters does not limit appellant to a federal remedy. If this were so, the *Davis* case, *supra*, would have had the opposite result, for in that case the deceased was actually on a barge on navigable waters and was loading the barge himself. In the case at bar, although appellant was on the barge at the time of the injury, he himself was not doing the actual loading.

To hold that a sawmill employee, a portion of whose work takes him temporarily aboard a barge for the purpose of laying two wooden blocks, is engaged in a maritime activity exclusively is contrary to every judicial decision since 1942. In fact, such a holding completely eliminates the so-called twilight zone theory and adopts a wholly new theory that any employee who at the time of his injury is aboard a barge in excess of 18 tons on navigable waters must seek his remedy only under the federal law.

III.

The Cases Relied Upon by This Court Do NOT Hold That the Plaintiff Is Limited to His Rights Under the Longshoremen's and Harbor Workers' Act, as Compared to Proceedings Under a State Compensation Act.

Pennsylvania RR Company v. O'Rourke, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302, was not a decision as between the Longshoremen's & Harbor Workers' Compensation Act and a state workmen's compensation proceeding. Instead, it was strictly between two federal acts; the Longshore Act and the Federal Employers' Liability Act. At 97 L. Ed. 374, the court makes two statements that specifically will eliminate this case as an authority for the question at hand.

(1) The so-called "duties test" is not applicable when the two federal acts are compared. In other words, a janitor or any other service man or construction worker who was injured on navigable waters must seek his remedy under the Longshoremen's Act as opposed to the Federal Employers' Liability Act. Such a limited standard is not true when the choice is between the Longshoremen's Act and a state workmen's compensation act, as we have seen, in the *Davis*, *Baskin* and *Moore*s cases, *supra*.

(2) The court specifically recognized that uncertainty existed in areas where state and federal statutes

might overlap. No such uncertainty existed or exists between the two federal statutes involved in the *O'Rourke* case.

Western Boat Building Company v. O'Leary, 198 F. 2d 409, certainly is not authority for the proposition that plaintiff as a matter of law, and without the right of introducing evidence on his behalf, is limited to his federal remedy. In fact, that case is authority that an injured party in a situation similar to appellant's may seek his remedy either within the federal field or by state workmen's compensation proceedings. The plaintiff in that case had actually applied to the Compensation Commission for the State of Washington and had received compensation. The only question at issue was could he now apply to the Longshoremen's and Harbor Workers' Compensation fund and receive payment from them also. The court rightfully applied the twilight zone theory and said that it did have such an election.

Conclusion

The petition for rehearing should be granted so that this court may hear arguments and consider only the one issue of whether as a matter of law appellant is limited in his remedy to that provided by the Longshoremen's Act. We firmly believe that upon reconsideration of this question this court will remand the case to the District Court for a full and fair hearing and trial. One of the elements of this trial would necessarily be the activities of the appellant and the overall activities of the appellee to determine whether or not

appellant was within the so-called twilight zone at the time of the injury.

Respectfully submitted,

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I, BURL L. GREEN, one of the attorneys for appellant petitioner, do hereby certify that in my opinion this petition is well founded in law and fact and that it is not interposed for delay.

Of Attorneys for Appellant.



No. 13,884

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California, Southern Division.**

APPELLANTS' OPENING BRIEF.

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No. 13,884

IN THE

**United States Court of Appeals
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VAUGHN H. MITCHELL and
DOROTHY MITCHELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California, Southern Division.**

APPELLANTS' OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This case was instituted by an indictment returned by the grand jury against the appellants for violation of Section 145(b) of the Internal Revenue Code, (26 U.S.C. Section 145(b)) and of Section 371, Title 18 United States Code (R. 3-8). After trial, verdicts of guilty were returned and filed on April 30, 1953 (R. 22, 2003). On May 5, 1953, appellants moved the court for a new trial, but their motion was denied on the same day (R. 23-24, 33, 2003). The court adjudged appellants guilty and pronounced sentence on May 12, 1953, the judgments of conviction being filed and entered May 15, 1953 (R. 34-38, 2003-2004). On May 14, 1953, appellants filed their notice

of appeal to this Court (R. 38-40, 2004). The jurisdiction of this Court is therefore founded on Section 1291 of Title 28, United States Code.

STATEMENT OF THE CASE.

The testimony and exhibits introduced in evidence below may be summarized as follows:

Dr. Vaughn H. Mitchell and Dorothy Mitchell, appellants, were married on November 10, 1944 (R. 1449). In late 1946, Dr. Mitchell learned that the government was investigating his 1942-1946 tax returns (R. 260-261). About the same time Dorothy Mitchell was pressing her husband to buy a home and had a difference of domestic opinion with him over it (R. 1449, 1456-1459). She decided that she would try to accumulate about \$10,000 as the price of a home, her own if the Doctor adamantly opposed, theirs if he acquiesced. She then sought out the Doctor's bookkeeper, Mrs. Iris Cowart, and told her that he had agreed to pay her \$500 a month as spending money in addition to household expenses. Because of the domestic difficulties involved, Dorothy wanted to be sure Mrs. Cowart kept a record of the moneys that went to her. (1456-1466.) In order to keep this record, Mrs. Cowart commenced in January, 1947, to use two sets of receipt books, one for morning receipts and one for afternoon. From time to time the morning receipts were delivered to Dorothy in sealed envelopes. (R. 266-279, 795, 1456-1466.)

At the close of the year, due to his pending difficulties on federal taxes the Doctor hired Joseph A. Lukes, a cer-

tified public accountant, to prepare the Mitchells' tax returns. Lukes came into the office late in 1946, made some preliminary checks of 1945 and 1946 in order to decide the best measure of receipts and finally settled on bank deposits. He did not know that the cash receipts taken by Dorothy during the year had not been banked and therefore his return of income did not include them. (R. 1063-1078, 1128, 1551, 1560-1564.) However, the morning cash receipt books were still in the office when he presented the estimated 1947 return for signature. These book were subsequently delivered to Dorothy. (R. 279-283, 766-768, 1466, 1474-1475, 1482.)

On February 16, 1949, Dr. Mitchell was indicted for tax evasion for 1942-1946. Dorothy Mitchell learned of it the same day and, in a fit of hysteria, burned the morning cash receipt books for 1947 that had been delivered to her. (R. 1471-1481, 1492, 1534.) Subsequently the Doctor was acquitted on all counts of the 1942-1946 indictment (R. 1551). The government commenced to investigate 1948 and 1947, for the former finding no fraud, but the latter providing the basis for this case (R. 117). As their investigation continued, the Doctor learned of the government's claim that some Kardexes (his record of accounts receivable) for 1947 might be missing. He confided in his wife and she told him of the cash receipts taken by her in 1947 and of burning the morning receipt books. She turned over to him the 1947 money taken by her, which amounted to \$8,770.00. (R. 1471-1481, 1492, 1604-1607, 1614, 1638-1639, 1644-1645.) The Doctor was subsequently indicted on three counts of income tax evasion and his wife on three

counts, two of which differed from his. The fifth count was common, a conspiracy charge involving both defendants and Mrs. Cowart, the Doctor's bookkeeper. During the trial, the government reconstructed the defendants' income to show an amount unreported of \$26,000 and introduced evidence of wilfulness. The defendants admitted unreported income of \$10,000 and introduced evidence of inadvertence.

In brief, the government's theory was that the defendants and Mrs. Cowart had conspired to conceal part of the Doctor's cash receipts by (1) not depositing part of them in the bank but delivering that part directly to Mrs. Mitchell, (2) keeping two sets of receipt books which would correspond with the division of cash receipts into reported and non-reported categories, and (3) systematically destroying Kardexes so that the Kardex system would agree with the cash receipt-bank balance total of gross income.

The defendants' theory was one of inadvertence and oversight. Keeping two sets of receipt books and delivering cash directly to Mrs. Mitchell were explained as implementing a plan whereby Mrs. Mitchell could accumulate \$10,000 for a payment on a home, the Doctor agreeable or not. Her burning of the books was the act of a frightened and hysterical pregnant wife. On the third point, the defence took direct issue: it attempted to prove no Kardexes had been intentionally destroyed. Finally, the defence raised the companion points of the defendants' ignorance of tax subtleties and the Doctor's lack of time to devote to financial matters.

Both defendants were convicted and appeal has been taken on the ground that the court below deprived them of a fair trial.

The testimony of each of the several witnesses called may be briefly summarized as follows: Louis H. Mooser, Jr., a treasury agent, was called as the first witness of the prosecution in order to identify certain banking and income tax records of the defendants which were received in evidence (R. 107-112).

Walter C. Barron, also a treasury agent, was called by the prosecution to testify about his examination of the defendants' 1947 and 1948 tax returns. (R. 112-255.) He commenced his audit with their joint return for 1948 to which he proposed several technical adjustments, finding no fraud. Defendants readily agreed to these adjustments. Before Barron finished his 1948 audit, he was furnished with the work papers of defendants' account from which the 1947 returns were computed. In checking these figures with the 1948 return, he was struck by the relatively low percentage of cash that had been received in 1947. He then made a further comparison with 1946 and found the following discrepancy: although in the period 1946-1948 check receipts from the Doctor's practice showed a "regular growth," cash receipts fluctuated widely, being \$54,000 in 1946, \$25,000 in 1947, and \$49,000 in 1948. (R. 115, 119-120.) Next, he discovered that the defendants' consistent practice for these years was to deposit all check receipts in the Doctor's commercial account and all cash receipts in his savings account. Defendants' accountant had, in figuring their 1947 cash receipts, merely totalled the year's bank deposits and had

used that total as a basis for computing their 1947 income tax. But, as Barron pointed out, cash deposits in 1947 ran about 50 per cent under cash deposits for 1946; it was this discrepancy that persuaded him to make a thorough audit of the defendants' 1947 returns. (R. 121, 124, 131.)

Barron then secured, without any trouble, all of defendants' records relating to 1947 and reconstructed their income from the credits posted on the Doctor's Kardexes, a loose leaf system of recording accounts receivable. He admitted that these records showed all but \$480 of the defendants' income, but he added, he believed as many as 10 per cent of the 1947 Kardexes were missing. (R. 177, 187, 228, 232-233, 252.)

Next, Barron interviewed several of the Doctor's employees. After these interviews, he decided to disclose his findings to the fraud investigators. (R. 132, 177.)

The prosecution's third witness was Harry M. Green, a treasury agent called from Reno, Nevada, to testify about the Doctor's returns for 1942 to 1946 (R. 255-264, 301-409). He had first become acquainted with the Doctor while examining his 1944 income tax return; his audit broadened to include 1942, 1943 and 1945 as well, but at all times he found the Doctor to be cooperative, and the Doctor willingly gave a statement under oath when asked to do so. From his personal observation, Dr. Mitchell did not seem to know much about accounting or income taxes. The Doctor was not in his office in the mornings and when he was there in the afternoons, he was busy, for the office was crowded with patients. (R. 255, 261, 351-353, 355, 358.)

After he testified that he had found preliminarily that the Doctor's understatement of income for 1942-1945 was \$100,000, and had so notified the Doctor, Green then stated that the total tax and penalties owed by the Doctor for 1938-1946 amounted to \$276,000 plus interest. Green's use of 1938-1941 was objected to. (R. 261-263.) Green further brought out that the Doctor had aided in preparing his 1941, 1942, 1943 and 1946 returns and had filed amended returns for the years 1942-1946 (R. 262-263, 392-393). A 50 per cent civil fraud penalty had been determined against him for these years, which is still subject to review (R. 389-390).

Concerning 1947, Green testified that Mrs. Cowart had informed him that all of the Doctor's cash receipts were being deposited in the bank (R. 303).

Mrs. Iris Cowart was next called by the government as an adverse witness. After she had completed her direct examination, the defendants' examination of her had to be postponed eight days (April 6, 1953 to April 14, 1953) due to the death of her husband. (R. 264, 300, 745.) She was called as a co-conspirator with defendants and testified about her work as bookkeeper for Dr. Mitchell from 1943 to 1948 (R. 264-300, 746-868). In that capacity she kept the Kardexes and did the billing and banking. She deposited check receipts in the Doctor's commercial account, cash receipts in his savings account. (R. 265-266.)

In 1947 Dorothy Mitchell told her that she needed extra money from the Doctor's practice in order to buy a home. They decided that Mrs. Cowart would give her the Doctor's morning cash receipts, keeping a record of

them in a separate set of receipt books. Dr. Mitchell confirmed this arrangement. (R. 266-270, 795.) Mrs. Cowart kept two sets of receipt books, one for the morning and one for the afternoon, the change over being made about 1:00 p.m. every day. The morning money was given to Dorothy Mitchell and the afternoon money was deposited in the bank. She estimated that the total delivered to Dorothy Mitchell in 1947 was \$15,000. (R. 270-279.) The morning cash receipt books were delivered to Dorothy Mitchell in 1948 after the Doctor's accountant had completed his preparation at the Doctor's office of the 1947 returns of the defendants (R. 279-283, 766-768). Even after the morning receipt books had been turned over to Mrs. Mitchell, the Kardexes in the office contained a complete record of 1947 receipts, including those delivered to Mrs. Mitchell (R. 814). Throughout Mrs. Cowart's testimony the prosecutor repeatedly referred to her prior testimony on these matters before the grand jury; at the conclusion of her examination by the prosecutor, which had been cross-examination, the prosecutor offered the grand jury transcript into evidence (R. 284-287).

Dr. Mitchell, Mrs. Cowart testified, had very little contact with the office books and did not like to be bothered with them. However, in 1947, when Mrs. Cowart wanted to destroy some old Kardexes—ten years old or more—the Doctor was reluctant to agree, although that was necessary to make room for new cards. Old Kardexes were destroyed in 1947, but none covering current patients, except a few through inadvertence. (R. 775-777, 779, 800.)

Mrs. Cowart denied making statements to Mrs. Pierson, the Doctor's receptionist in 1947, that their purpose in keeping the two sets of receipt books was to conceal taxable income. Finally, she pointed out that Mrs. Pierson in 1947 had been a nervous, homesick person, who had great difficulty in locating Kardexes when she needed them; frequently, one of the other girls would have to locate them for her. (R. 760-764, 777-778.)

Mrs. Jean Pierson was the only other witness called by the prosecution who was not a treasury agent (R. 412-514). She served as the Doctor's receptionist from January to August, 1947, a period during which she was restless and homesick. Her duties consisted of greeting patients, writing receipts and getting out Kardexes. She was kept very busy, since the Doctor saw 50 to 100 patients an afternoon. (R. 412-413, 491.) On frequent occasions she could not find Kardexes for certain returning patients who should have had cards. In the spring of 1947 she learned that Mrs. Cowart was using two cash receipt books, one for the morning and one for the afternoon, and she testified that Mrs. Cowart confessed this was for the purpose of concealing part of the Doctor's income. All this, she testified Mrs. Cowart told her, was the Doctor's idea. (R. 416-423.)

Her testimony continued as follows: she had seen Mrs. Cowart destroy Kardexes with 1947 charges on them, and Mrs. Cowart had explained that this was necessary to prevent the government from checking up on the Doctor (R. 482-488). The Doctor had asked Mrs. Cowart to take out a safe deposit box, but she had refused, thinking that would be the first place agents would look for

money (R. 421-422). Mrs. Cowart appeared nervous about the whole matter and finally confided in the witness that the Doctor had asked her to take the full blame for it (R. 424-425).

The final prosecution witness was Melvin C. Whiteside, another treasury agent who had worked on the 1947 audit (R. 514-745). He first identified bank records of other bank accounts of the Doctor and then proceeded to outline his investigation for 1947. He noticed that in 1946 the Doctor's office had used 18 cash receipt books, in 1948, 29, but in 1947 only 9. He found evidence of cash that had been received for which no duplicate receipt existed. (R. 522-523.) His reconstructed total of unreported income in 1947 was \$26,242.75. Since the Doctor's accountant, in adding all the credits posted to the Kardexes in 1947, had found only \$10,000 unreported, Whiteside decided that the difference, or \$16,000 worth of Kardexes, must be missing. The Kardexes gave him a list of 1000 patients with 2,000 payments, which were not contained in the cash receipt books. These patients were contacted and 380 receipts were produced that had been written in 1947 from cash receipt books other than the ones in existence. These 380 receipts totaled \$5,500, of which only \$469.50 was not contained in the Kardexes themselves (R. 527-537, 573).

Of the \$16,000 of Kardexes assumed missing, Whiteside admitted they must represent *reported* receipts, since they did not make up any part of his \$26,000 which was based on information secured from the existing Kardexes (R. 687-688). As part of this \$16,000, he had prepared a

specific list of 100 patient names (Exhibit U. S. #29) representing \$5,000 in payments contained in the cash receipt books, but for which he could find no Kardex (R. 720-721).

He said that in 1949 the Doctor and his accountant had admitted that \$10,000 of cash receipts had not been reported and that the Doctor's bookkeeping system in 1947 had no provision for internal control; it was therefore possible that receipts could have been taken out without the Doctor's knowing it (R. 539, 686).

The prosecution then rested (R. 869) and the defence called as its first witness Mrs. Mary Gudat (R. 877-951). Mrs. Gudat had been the Doctor's office nurse from May, 1947 to October, 1949 (R. 878, 889). After testifying briefly about office routine and an interview with agent Whiteside, she told of Mrs. Pierson's troubles in the office—being unable to find Kardexes in the file which others would then find for her, being absent from work frequently and being unhappy. Mrs. Gudat stated that she had never seen any current Kardexes destroyed, nor had she ever found any missing when she needed them. The only Kardexes that had been destroyed were old ones, just before the office moved to new quarters. (R. 890-898.)

The defence's second witness was Mrs. Erle Sprague Dumont, the Doctor's secretary during 1947. She had been employed in the Doctor's office from April, 1946 to April, 1949, first as receptionist, then as secretary. (R. 953-954.) Her testimony (R. 952-990) concerned office routine which, she stated, was rushed (R. 963). She testified that current Kardexes had never been destroyed, but

that in June or July of 1947 old out-of-date ones had been cleaned out to make room in the files. Mrs. Pierson, she testified, often needed help to find Kardexes which were in the files. (R. 964-968.)

Defence's next witness was Theodore Roche, Jr. (R. 991-1053). He was defendants' attorney and in that capacity in the fall of 1946 he was consulted by Dorothy Mitchell on a domestic problem concerning the purchase of a home. When informed of this, Dr. Mitchell responded favorably and agreed to her request. (R. 993-998.) He had charge of the investigation made on defendants' behalf of their 1947 tax affairs; as a result of the discrepancies he discovered in the government's findings, he decided to hire an independent firm of accountants to audit 1947. Mr. Sonnenberg of Forbes & Co. was called. Their investigation showed that there were 4,097 Kardexes relating to 1947, containing 3,891 patients listed on the patient listing, and finally that no substantial number of 1947 Kardexes were missing. (R. 1016-1033.)

The certified public accountant who prepared and filed the defendants' 1947 tax returns, Joseph A. Lukes, was called as the defence's next witness (R. 1053-1140, 1147-1335). He had originally been employed to compute the 1947 tax, and in order to find the best way of doing it, he checked certain records against the 1945 and 1946 returns. He thereby satisfied himself that the Doctor's bank deposits were an accurate reflection of gross receipts. A procedure such as this he found necessary since the Doctor's records could not be relied upon; they provided no correlation or provision for internal control. Therefore,

he selected the bank deposits as the measure of receipts and did not check the Kardexes or learn that Dorothy Mitchell had taken money out of the business that had not previously been deposited. But he did point out that neither the Doctor nor Mrs. Mitchell ever gave him instructions as to the manner in which the 1947 return should be prepared. (R. 1063-1078, 1128.)

After trouble had arisen over the 1947 returns, he made an independent check of the Kardexes. The total 1947 credits contained on them were \$10,000 more than the gross income defendants had reported. (R. 1099-1100, 1128.) He found no missing Kardexes and he was sure that there were none. Every item contained in the government's list of \$26,000 of unreported income had been identified by him as being covered in defendants' reported income for 1947 or in his \$10,000 amount of understatement. (R. 1134-1137.) From observation he testified that the Doctor had no contact with his office records and that quite a few of his bank statements had never been opened (R. 1162-1163).

Thomas V. McQuade, branch manager of the Bank of America, was called to testify about the Doctor's cash deposits in 1949 and in 1950 for purposes of comparison with 1947. He was not permitted to testify on this subject. (R. 1140-1146.)

Otto J. Sonnenberg, certified public accountant and partner in Forbes & Co., appeared as a defence witness (R. 1337-1448, 1535-1543). He had been engaged by the defendants to determine their 1947 income. In making

this investigation, he found that 4,097 Kardexes relating to 1947 were present, covering 3,891 names on the patient listing record or on the hospital record. His engagement, however, was not completed. (R. 1339-1342.)

His second assignment was to determine the defendants' gross income for 1947, assuming all the cash receipt records had been destroyed. To do this, he used the Kardexes, the patient listing record and the hospital records. His result, on the accrual basis, was \$149,340.95, not making allowances for discounts and allowances, write-offs or collection charges. The Kardexes alone showed a gross income of \$133,000, or an understatement of \$11,000 for 1947. (R. 1354-1355.) In reconstructing income, he was able to find Kardexes for all but 19 patients of which he had a 1947 record (R. 1535).

Dorothy Mitchell next took the stand in defence of herself and her husband (R. 1448-1534). She had married Dr. Mitchell on November 10, 1944, and their first child was born in 1946. During the latter part of that year they were living in a small apartment and she wanted to purchase a home. (R. 1449, 1457-1459.) In January, 1947, she told Mrs. Cowart that the Doctor had agreed to give her \$500 a month for spending in addition to the household expenses. She wanted to accumulate about \$10,000 as a down payment on a home and she intended to tell the Doctor about it when they went out to buy the home. But, because of domestic difficulties that might culminate in divorce or separation, she asked Mrs. Cowart to keep a separate record of the moneys that were delivered to her out of the business. The practice of the

two sets of receipt books was then instituted. (R. 1456-1466.)

During 1947 she continued to get this extra money about once a month. The separate receipt books were kept through 1947, and after January 15, 1948, they were delivered to her by Mrs. Cowart, who was quitting to have a baby. There were only two or three books involved. (R. 1466, 1474-1475, 1482.) In March, 1948, she signed her tax return which had been completely prepared for her by Lukes; she did not look at it because it would not have meant anything had she looked at it (R. 1475-1478).

On February 16, 1949, she was told, in the Doctor's absence, that he had been indicted for income tax violation. She became hysterical and burned the morning cash receipt books which had been delivered to her a year earlier. At the time she did not realize the indictment covered the years 1942-1946, not 1947. Later, in September, 1949, she told the Doctor about it and turned over to him the money which she had received from Mrs. Cowart; he was furious with her. The total amount of cash she turned over to him, in envelopes that were still sealed, was \$8,770.00. (R. 1471-1481, 1492, 1534.)

Dr. Vaughn H. Mitchell also testified as a defendant (R. 1543-1750). He referred to his prior tax trouble for 1942-1946, for which he was acquitted in 1949. However, it was this prior investigation that prompted him to hire Lukes as an accountant to prepare the 1947 return. (R. 1551, 1560-1564.) He recalled filing an estimate of 1947 tax in the first two weeks of January, 1948, and signing the

final 1947 return, which had been prepared by Lukes, without examining or studying it (R. 1570-1571).

He denied planning with either his wife or Mrs. Cowart to conceal part of his 1947 income. During that year he was not aware that his wife was taking money from the business, in addition to her household checks. He first learned of this fact on September 25, 1949, after a trip to see Mrs. Cowart about the government's claim of missing Kardexes. On his return his wife told him of the money she had taken in 1947, of the two sets of receipt books, and of the fact she had burned them earlier in 1949 when she had learned of his prior indictment. She delivered the money to him—contained in 12 or 14 sealed envelopes within a large manila envelope. The amount of that money was \$8,770.00. (R. 1604-1607, 1614, 1638-1639, 1644-1645.)

He testified that he was unfamiliar with the office books, except for his medical records and the Kardexes, which he considered essential. He did not order any of them destroyed and was sure that substantially all the 1947 Kardexes are present. The only destruction of Kardexes that took place was just before the office moved quarters; then out-of-date ones were thrown away to make more room in the files. (R. 1589-1591, 1741.) During 1947 he treated 50-60 patients an afternoon (R. 1619). Finally, he estimated that he would write-off bills as uncollectible of an average of at least \$5,000 per year (R. 1650).

The last witness was Dorothy A. Cummings, also called by the defence (R. 1751-1757). She is Dr. Mitchell's present medical secretary, having served him from June 12,

1950 (R. 1751). Briefly, she testified she had checked Sonnenberg's list of 19 names which had not been found on the Kardexes and had located all but eight from the Kardexes in court despite their present disarray (R. 1752-1755).

SPECIFICATION OF ERRORS.

1. The District Court erred in removing from its charge to the jury the statutory requirement that defendants' acts be "wilfully" done before they could find guilt. This error was committed in the following instructions given by the court to which the defendants objected (R. 1941-1942, 1945):

"I instruct you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge to things that are put out in the open and are obvious to him and say, 'I have no knowledge of such facts.' He must exercise such intelligence as he has, and if the evidence shows that he intended to conceal tax liability from the government, then of course he was not acting in good faith."

"Now, of course, the owner of a business or the practitioner of a profession need not be the actual bookkeeper to be familiar with the affairs and finances of that business. It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. Of course he would not be liable for innocent clerical mistakes, but he must be held to know

that which it is his duty to know and which he solemnly promulgated, and it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns or not.”

Prior to the jury’s retirement, defendants stated their objection to the above instructions and offered to give their reasons. The court refused to hear them but permitted defence counsel to file a memorandum of points with the clerk. (R. 1957.)¹

Another instruction given by the court which eliminated the requirement of wilfulness is the following (R. 1945):

“The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else.”

The error of this instruction was called to the court’s attention in the argument of defense counsel on his motion for new trial. (R. 1984-1985.)²

2. The District Court erred in injecting into its charge to the jury elements of the crime covered by Section 145(a) of the Internal Revenue Code, for which defend-

¹The points raised in this memorandum, which the court refused to consider, are set forth verbatim in the Appendix, pp. iii-iv.

²Defence counsel stated of this charge, “I submit that a person who can read or write cannot, as a result of that, know the many, many complexities of the income tax law * * *.” (R. 1988.)

ants were not indicted. The specific instruction in which this error was contained reads as follows (R. 1952):

“Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.”

This was the government’s proposed instruction No. 51, to which defendants immediately objected, calling their grounds to the court’s attention before the jury had retired. (R. 19, 1957.)³

3. The District Court erred in failing to charge the jury that Dr. Mitchell’s acquittal on similar charges for the years 1942-1946 conclusively established that no wilful attempt to evade taxes had been made in those years. In fact, the court instructed the jury just to the contrary; these instructions are as follows (R. 1938-1939, 1944):

“You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the result of any previous trial.”

³Just as in the preceding specification, defence counsel offered to state his grounds, but the court cut him off short, saying, “You need not state the reasons. Just give them by number.” Defendants then filed a memorandum in support of his objection (R. 19-21, 1957).

Defendants brought out this point sharply on their argument for a new trial. In effect, defence counsel pointed out, the charge of the court “invite(d) the speculation of the jury” on Dr. Mitchell’s guilt or innocence for 1942-1946, a matter foreclosed to them by the prior acquittal. (R. 1978-1979.)⁴

4. The District Court erred in depriving defendants of their right to cross-examine an important prosecution witness. The court’s error in this respect was bitterly contested by defence counsel at the time it was made (R. 758-759) and its effect was to confine him to a direct examination of the prosecution’s witness at the prosecutor’s insistence. (R. 766, 770, 785, 794, 795-796, 797, 800, 805, 813, 824-826, 828-831, 839-840.)⁵

5. The District Court erred in refusing to dismiss for cause a juror who admitted to a bias formed from newspaper accounts of the defendants’ first trial. At the time of the *voir dire* of this juror, who became the foreman of the jury, the defence had exhausted its peremptory challenges. Hence, when the facts of the juror’s bias were developed, defendants’ only recourse to protect themselves was to ask that the juror be excused for cause. This request was made, but the court denied it. (R. 60.) Immediately after the jury was sworn, defendants renewed at length their request out of the presence of the jury,

⁴The full text of defence counsel’s remarks is set forth in the Appendix, pp. iv-v.

⁵Defence counsel’s precise language to the court was (R. 758-759): “This lady is put into the case as an alleged conspirator by the Government, called by them, and a lot of hearsay testimony admissible under that rule of conspiracy has been introduced. I don’t believe I am limited to the rule of a person asking questions as a direct examiner, they bringing her here, I didn’t.”

but their motion was denied. (R. 60-63.) The failure of the court to discharge this juror was a cornerstone of defendants' argument for a new trial. Again, their motion was denied. (R. 1968-1973.)

6. The District Court erred in overruling defendants' demand to inspect a documentary statement used by the prosecution to impeach Dr. Mitchell. The statement taken by the government at an earlier examination of Dr. Mitchell was produced by the prosecution during its cross-examination of him. At the time it was first referred to, defence counsel asked to see it; his request was denied. (R. 1686-1687.) His demand for inspection was renewed just at the time the prosecutor insisted on reading part of its contents into the record; the demand was again overruled (R. 1688). When Dr. Mitchell indicated that his earlier words were being taken out of context, defence counsel objected to the prosecutor's use of the statement without displaying it to the defence; his objection was overruled (R. 1690-1691). At the conclusion of their case, defendants moved for a dismissal on the ground that their demand for the production of records held by the prosecution had not been honored; the motion was denied (R. 1758). And, finally, the error was again called to the court's attention, and again denied, in defendants' argument on their motion for a new trial (R. 1989).

7. The District Court erred in refusing to compel the prosecution to produce for inspection certain evidentiary statements held in its possession. These statements were four in number—two of them were transcripts of interviews by government agents with prosecution witnesses who had testified at the time defendants made their de-

mand, one was a similar transcript of an interview with Dr. Mitchell who testified later, and the fourth was a document used by a government agent to refresh his recollection while testifying. Each of these documents was carefully identified on cross-examination of a government witness, and each was shown to be in court. Despite these facts and despite defendants' showing that the documents were relevant to this trial, the prosecution refused to produce them and the court refused to enforce defendants' demand for their production. (R. 547-554, 590-591, 595-605, 612-614.) At the close of the trial, defendants moved for a dismissal on the ground that their demand for production had not been enforced; their motion was denied (R. 1758). The same error was emphasized in the argument for a new trial, which was also overruled (R. 1989-1993.)⁶

8. The District Court erred in receiving the prosecution's evidence of Dr. Mitchell's deficiencies in income taxes for the years 1938-1941. In summary, this evidence consisted of testimony that in 1941 he had reported \$6,800 of net income but had earned \$30,200; in 1940, \$7,000, when he had earned \$27,800; in 1939, \$4,700, when he had earned \$23,400; in 1938, he had not filed a return, although he had \$21,000 of net income (R. 386-387). This evidence was received over defendants' objection that it was irrelevant (R. 262-264, 385-391). On cross-examination of two of the defendants' witnesses, the prosecutor

⁶In his argument defence counsel urged as his major ground the compelling necessity for requiring the prosecution to disclose facts in its possession in order to obviate the possibility of convicting accused persons on the testimony of untrustworthy persons (R. 1991).

covered the same ground, again over repeated objections that it was not relevant and that its seriously prejudicial effect forbade the prosecutor from bringing it before the jury (R. 1202-1222, 1666-1677). In each instance, the objection was overruled. Then, on their motion for new trial, defendants again raised the error, but in vain (R. 1977).

9. The District Court erred in excluding defendants' evidence of their innocence under a chain of reasoning selected by the prosecution to show their guilt. The prosecution had shown a marked decrease in cash receipts in 1947 when compared to 1946 and 1948, and pointed out to the jury that this discrepancy evidenced an understatement of income for 1947. In order to rebut this circumstantial evidence of their guilt, defendants made repeated offers of evidence to show that cash receipts in 1949 and in 1950 bore approximately the same ratio to total receipts as they did in 1947; in brief, defendants attempted to show that a comparison of 1947 cash receipts with those of 1949 and 1950 indicated that no wilful understatement of income had been made. Their attempt was summarily denied by the court, although the grounds of their offer were fully stated. (R. 1144-1145, 1149-1151, 1156-1160, 1319.) In the absence of the jury, defence counsel made an extended proffer, indicating that "it (the evidence offered) goes to defeat the Government's charge that there was something awfully unusual about 1947." (R. 1159.) Although his repeated attempts to introduce this evidence bore no fruit, defence counsel raised the point again on argument of defendants' motion for a new

trial; the point was again rejected by the court (R. 1982-1983).

SUMMARY OF ARGUMENT.

I. Defendants signed and filed returns prepared for them by some one else, from records kept for them by yet other persons. The returns were incorrect. Defendants were prosecuted, and the instructions given to the jury erroneously dispensed with the requirement that defendants' actions must be proved to be "willful." I.R.C. Sec. 145(b) penalizes only "willful" attempts to defeat or evade the tax. Yet the trial judge instructed the jury that defendants were required by law to exercise "ordinary diligence as to the correctness" of their returns, "whether prepared by (defendants) or prepared by somebody else." Furthermore, the trial judge instructed the jury that as a matter of law "a defendant charged by law with the duty of filing a return * * * must be held to know that which it is his duty to know and which he solemnly promulgated."

These parts of the instruction were erroneous. Wilfulness is an essential element of the offence charged, and in tax offences wilfulness means with "an evil motive." *United States v. Murdock*, (1933) 290 U.S. 389; *Spies v. United States*, (1943) 317 U.S. 492; *Hargrove v. United States*, (CA 5, 1933) 67 F. 2d 820; *Arnold v. United States*, (CA 9, 1935) 75 F. 2d 144; *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. *United States v. Martell*, 345 U.S. 917. It necessarily follows, therefore, that defendants are not criminally liable for some other

person's mistakes, whether that other person was acting wilfully or not. "Willful" guilt is personal, not imputed (*Lurding v. United States*, (CA 6, 1950) 179 F. 2d 419, 421), because it is nonexistent unless there is "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it." *Hargrove v. United States*, supra, 67 F. 2d at 823; *United States v. Martell*, supra; *Spurr v. United States*, (1899) 174 U.S. 728.

Moreover, conduct which lacks "ordinary diligence" is negligent, but it is not wilful. *Lurding v. United States*, supra, 179 F. 2d at 421; *Inland Freight Lines v. United States*, (CA 10, 1951) 191 F. 2d 313, 316; *Browder v. United States*, (1941) 312 U.S. 335, 341-2. This is a necessary corollary of the requirement that to be "willful" conduct must be with an evil motive.

The errors in the instruction are not cured by the presence of some unobjectionable matter. *Bollenbach v. United States*, (1946) 326 U.S. 607; *Spurr v. United States*, supra; *United States v. Martell*, supra. Where good and bad are mixed together, the jury cannot be expected to distinguish the bad and disregard it.

The bad instruction also permeated the conspiracy count. Wilfulness was a necessary element in that count, since it charged a "wilful" conspiracy to "wilfully" evade or defeat the tax. Moreover, the jury was not told that the objectionable instructions related only to the substantive counts and not to the conspiracy count.

The prejudicial effect of this error is evident from the fact that it commanded the jury to ignore defendants'

entire defence, which was that the errors in their returns were not known to them when they signed the returns.

II. The jury was also told that defendants could be convicted if it decided that their books and records were not "sufficient to establish the amount of (their) gross income, and the deductions, credits and other matters required to be shown in any income tax return." An instruction to this effect would have been erroneous even if defendants had been indicted under Section 145(a), since that section penalizes only "willful" failures to keep "such records" as are required "by law or regulations." *Brink v. United States*, (CA 6, 1945) 148 F. 2d 325, 328. It was doubly wrong here, since the requirements of Section 145(b) cannot be satisfied by proof of one or more offences under Section 145(a). *Spies v. United States*, (1943) 317 U.S. 492.

The Government's case tended to establish that defendants' net income could not be entirely accurately determined from their records. Defendants' evidence controverted this, while not denying that the records were chaotic. The instruction left the jury free to convict if it decided that the records were not "sufficient," which was error. Defendants' duty to keep "sufficient" records was not a part of the case, since the indictment was not for a misdemeanor under Section 145(a), on which the statute of limitations had long run.

Again the fact that elsewhere an unobjectionable instruction can be found is irrelevant, since the bad part permitted the jury to sidestep the real and more difficult

issue and convict if it found that defendants' records were not "sufficient."

III. Dr. Mitchell had previously been tried and acquitted on a charge of wilful attempt to evade and defeat the tax in the years 1942 to 1946, inclusive. Notwithstanding that prior acquittal, the prosecution introduced much evidence about the Doctor's understatement of income in his returns for those earlier years, for the avowed purpose of establishing a pattern of wilful conduct which persisted into the year in question. The defence did not seek to retry the 1942-1946 case but relied entirely on the fact of prior acquittal.

With such evidence in the record, the trial judge should have instructed the jury that as a matter of law Dr. Mitchell did not have a wilful intent to evade taxes in the years before 1947, and that the prior acquittal conclusively established the innocence of his purpose in years before 1947. This was the necessary effect of the settled rule that *res judicata* precludes collateral attack between the parties on a fact determined in a prior acquittal or conviction. *United States v. Oppenheimer*, (1916) 242 U.S. 85; *Local 167 v. United States*, (1939) 291 U.S. 293; *Sealfon v. United States*, (1948) 332 U.S. 575; *Emich Motors Corp. v. General Motors Corp.*, (1951) 340 U.S. 558.

Instead of instructing the jury properly about the effect of the prior acquittal, the trial judge instructed it "nor are you to consider for any purpose whatsoever the result of any previous trial." Farther on, the judge instructed the jury about its right to consider

the pre-1947 evidence on the question of intent, in exactly the same manner as he would have had there been no prior acquittal. Apparently the trial judge conceived that the prior acquittal had no greater effect than to bar double jeopardy, but at least since 1916, when *United States v. Oppenheimer*, supra, was decided, it has been settled that the United States cannot make a collateral attack, in a subsequent criminal case, on facts determined in the prior acquittal. This prohibition extends to later criminal cases involving different offences. *Sealfon v. United States*, supra.

Accordingly, defendant Dr. Mitchell was deprived of the benefit of his prior acquittal, which was prejudicial error.

IV. One of the prosecution's key witnesses, one of the two who were not government agents, was Mrs. Iris Cowart, named in the indictment as a co-conspirator although not as a co-defendant. Mrs. Cowart was called by the prosecution as a hostile witness and was subjected to intensive cross-examination and impeachment at its hands. At the conclusion of the government's examination, this witness was turned over to the defence for examination, but the right to cross-examine was denied by the trial judge. Defendants were compelled to examine Mrs. Cowart on direct examination as if she were a witness called by them.

This ruling of the court below abrogated a fundamental right of the defendants, the right to cross-examine the prosecution's witnesses. *Alford v. United States*, (1931) 282 U.S. 687. This elemental right has been reaffirmed by courts in situations similar in all substantial respects

to that outlined above, for the fact that the prosecution chooses to impeach its own witnesses cannot affect the defendants' rights. *United States v. Michener*, (CA 3, 1945) 152 F. 2d 880, 883; *J. E. Hanger, Inc. v. United States*, (CA D.C., 1947) 160 F. 2d 8, 9.

Furthermore, the trial judge lost sight of the fact that Mrs. Cowart had been named as a co-conspirator; as such, she was peculiarly the type of witness requiring the most extended and searching cross-examination by the defendants. *Moyer v. United States*, (CA 9, 1935) 78 F. 2d 624, 630; *Greenbaum v. United States*, (CA 9, 1935) 80 F. 2d 113, 123.

For its denial to defendants of the primary right of criminal trial procedure—to confront and to cross-examine their accusers—the court below must be reversed. *Alford v. United States*, supra; *United States v. Michener*, supra; *J. E. Hanger, Inc. v. United States*, supra; *United States v. Bourjaily*, (CA 7, 1948) 167 F. 2d 993.

V. After their peremptory challenges were exhausted, defendants challenged for cause a prospective juror, Hershler, who later became foreman of the jury. Mr. Hershler himself was concerned about his impartiality, and during his *voir dire* examination volunteered the fact that he had followed closely the newspaper accounts of the first trial of the 1947 case, which had ended in a hung jury. He stated that he had formed an opinion then, and while he thought he no longer held one he was not sure that it did not persist subconsciously. When asked whether he would wish to be tried to a jury con-

taining jurors with his state of mind, he replied that he would prefer not.

It was reversible error to refuse to dismiss this juror. Cases so holding on virtually identical facts are *Fitts v. Southern Pacific Co.*, (1906) 149 Cal. 310, 86 Pac. 710, and *People v. McQuade*, (1888) 110 N.Y. 284, 18 N.E. 156. This juror was not properly impartial, by his own admission that he would not want to be tried by a jury of his state of mind.

VI. On cross-examination of Dr. Mitchell, the prosecution produced a documentary statement taken of him by the government at an earlier date. The prosecutor then proceeded to impeach him by attempting to show inconsistencies between his present answers and his earlier statements. Defence counsel demanded to see the document from which the prosecutor was reading. The court below denied his request. The defence then asked that the document be marked for identification. This request was also denied.

These rulings of the trial judge were contrary to basic trial procedure. *The Charles Morgan v. Kouns*, (1885) 115 U.S. 69, 77; *Chicago, M. & St. P. Ry. Co. v. Artery*, (1890) 137 U.S. 507, 520. By denying to the defendants their right to inspect and to introduce into evidence this document, the trial judge placed in the hands of the prosecutor a power capable of gross misuse. Under his ruling neither the court nor the defendants could be certain that the parts read by the prosecutor were a fair summary of the document or, in fact, were anything more than a fabrication. For this reason the courts have

insisted that the opposing party see any document used by counsel to impeach a witness on cross-examination, and if he desires, introduce it into evidence. *United States v. Corrigan*, (CA 2, 1948) 168 F. 2d 641, 645; *Affronti v. United States*, (CA 8, 1944) 145 F. 2d 3, 7; *Powers v. United States*, (CA 5, 1923) 294 F. 512, 514; *Jones v. United States*, (CA 9, 1908) 162 F. 417, 431, cert. den. 212 U.S. 576.

For depriving defendants of their rights to see and to use the statement produced by the prosecution, the court below must be reversed. *Gordon v. United States*, (1953) 344 U.S. 414; *United States v. Grayson*, (CA 2, 1948) 166 F. 2d 863, 870); *United States v. Krulewitch*, (CA 2, 1944) 145 F. 2d 76, 79; *Asgill v. United States*, (CA 4, 1932) 60 F. 2d 776, 779.

VII. One of the government agents called as a witness for the prosecution, Mr. Whiteside, disclosed to the court that he had taken statements from certain of the witnesses called to testify in the present trial. Two of these statements were taken of the prosecution's witnesses, Mrs. Pierson and Mrs. Cowart, and the third was taken of one of the defendants, Dr. Mitchell. Although Mr. Whiteside had testified about his recollection of the substance or the circumstances of each statement, and although the record shows the statements were in court, the prosecution refused to produce them for inspection by the defendants. When defence counsel turned to the court for assistance, the court refused his request, ruling that the defendants had no right to see these statements.

In so ruling, the trial judge committed prejudicial error. Having laid a foundation for their demand, the

defendants were entitled, as a matter of right, to see these statements. The failure of the court below to enforce their right constitutes error justifying its reversal. *Gordon v. United States*, (1953) 344 U.S. 414; *Bowman Dairy Co. v. United States*, (1951) 341 U.S. 214.

Similarly, the judgments below should be reversed for another error of the trial judge. The same witness, Mr. Whiteside, was handed his report to use in refreshing his recollection on a point about which he was being cross-examined. At the time the prosecutor handed over this report, defence counsel demanded to inspect it. The court below denied the request. Then defence counsel asked that it be marked for identification. Again his request was denied.

Both of these rulings were error; whenever a witness is handed a document to use in refreshing his recollection, the opposing party has a right to see it. *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150, 231. For denying defendants their right to inspect and to introduce into evidence, if necessary, the report used by the prosecution's witness with the prosecutor's assistance, the court below must be reversed. *Montgomery v. United States*, (CA 5, 1953) 203 F. 2d 887, 893; *Little v. United States*, (CA 8, 1937) 93 F. 2d 401, 405.

VIII. The prosecution, over objection, introduced evidence of Dr. Mitchell's deficiencies in tax and penalties for the years 1938-1941, although the year for which he was being tried was 1947. The court below thought so well of this evidence that it permitted the prosecution to develop it four separate times. Furthermore, on cross-examining

the defendant Dr. Mitchell, the prosecutor brought in the years 1934-1937, also over objection.

By permitting this evidence to be received in evidence as to defendant Dorothy Mitchell, the court below erred. The Doctor's actions in 1934-1941 could have no possible bearing on Dorothy Mitchell's guilt in 1947; she did not marry him until 1944. As to her, reversal of the court below is inescapable. *Wolcher v. United States*, (CA 9, 1952) 200 F. 2d 493, 497.

Nor was the evidence properly received as to the Doctor. It was too remote in time to shed any light on his intent on March 15 of 1948 when he filed his tax return for 1947. Since evidence of this nature is always prejudicial, its use must be severely circumscribed. For permitting this evidence to be brought out and to be cumulated before the jury, the judgments of conviction entered below must be reversed. *Boyd v. United States*, (1892) 142 U.S. 450, 458; *Boyer v. United States*, (CA D.C., 1942) 132 F. 2d 12, 13; *Lovely v. United States*, (CA 4, 1948) 169 F. 2d 386, 389, cert. den. 338 U.S. 834; *Sang Soon Sur v. United States*, (CA 9, 1948) 167 F. 2d 431.

IX. The prosecution introduced certain circumstantial evidence of defendants' guilt by showing the discrepancy in the 1947 ratio of defendants' cash receipts to their total receipts when compared to the same ratio for 1946 and 1948. Since the ratio was a greater percentage in 1946 and 1948 than in 1947, the prosecutor asked the jury to conclude that the 1947 receipts were understated by the difference in percentages. This conclusion was pointed up by a treasury agent's testimony that these were the facts

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that persuaded him to undertake a thorough audit of the defendants' returns.

In order to rebut this evidence, defendants sought to introduce evidence of the ratio of their cash receipts to total receipts in the years 1949 and 1950, which were consistent with 1947's ratio rather than the ratio selected by the prosecution. Their offer of evidence was denied, although its receipt would have destroyed the effect of the prosecution's evidence. Under these circumstances, defendants were entitled to introduce the evidence on rebuttal. *Johnson v. United States*, (1943) 318 U.S. 189, 195; *Gendleman v. United States*, (CA 9, 1951) 191 F. 2d 993, 996, cert. den. 342 U.S. 909; *Emich v. United States*, (CA 6, 1924) 298 F. 5, 9, cert. den. 266 U.S. 608. The court below should be reversed for refusing to permit the defendants to show their innocence under a theory selected by the prosecution to show their guilt. *Singer v. United States*, (CA 3, 1932) 58 F. 2d 74, 77; *Erhardt v. United States*, (CA 7, 1920) 268 F. 326; *Chitwood v. United States*, (CA 8, 1907) 153 F. 551, 552.

I. THE CHARGE TO THE JURY ERRONEOUSLY REMOVED THE STATUTORY REQUIREMENT THAT DEFENDANTS' ACTS BE PROVED TO BE "WILLFULLY" DONE.

The offence charged in counts 1 to 4, inclusive, was that defendants "did wilfully and knowingly attempt to defeat and evade" the income tax. These counts are in the language of Internal Revenue Code Section 145(b) [Appendix, *infra*], which section is specifically referred to in each count. (R. 3-6.) The fifth count charges that the

defendants "did * * * wilfully and unlawfully * * * conspire * * * wilfully to attempt to evade and defeat" the tax. (R. 6-7.)

The charge to the jury was fatally defective in failing to instruct the jury properly as to the meaning of the term "wilfully and knowingly". The charge given for counts 1 to 4 actually, unbelievable though it may seem, dispensed not only with the requirement of wilfulness but even with the requirement of knowledge. The charge concerning the conspiracy count was so joined to the charge on the other counts that at worst it was misleading to the jury and at best it was confusing.

1. The charge instructed the jury that, as a matter of law, no "defendant charged by law with the duty of filing a return could sign and file a false return * * * and escape punishment by disclaiming knowledge of that which he had sponsored." (R. 1945.)⁷ This instruction was utterly

⁷The full text of the offending paragraphs in the instructions is as follows:

"I instruct you, ladies and gentlemen, that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge to things that are put out in the open and are obvious to him and say, 'I have no knowledge of such facts.' He must exercise such intelligence as he has, and if the evidence shows that he intended to conceal tax liability from the government, then of course he was not acting in good faith." (R. 1941-1942.)

"Now, of course, the owner of a business or the practitioner of a profession need not be the actual bookkeeper to be familiar with the affairs and finances of that business. It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. Of course he would not be liable for innocent clerical mistakes, but he must be held to know that which it is his duty to know and which he solemnly promulgated, and

wrong, and its effect was to instruct the jury that the entire defence case was beside the point and should be disregarded, even if the jury believed it to be true.

The damaging effect of this erroneous charge will be apparent from a brief review of the case for the defence. The returns filed for 1947 were erroneous. The defence to the criminal charge was that the defendants did not know the returns were incorrect at the time they were filed. The returns were prepared by a certified public accountant, who testified that neither defendant had suggested that he prepare false returns. With minor exceptions, this accountant did not obtain the figures placed in the returns from either defendant. He obtained them from defendants' bank deposits and office records. The office records showed a larger gross income than he calculated, but the records were confused. The defendants did not keep the records themselves but allowed employees to do so with no supervision and guidance from either the Doctor or his wife. This then was the purport of the evidence offered by the defence.

Instead of being instructed that it should consider this defence evidence and determine whether defendants knew their returns were false or otherwise had "wilfully and

it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns or not." (R. 1945.)

"The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (R. 1945.)

knowingly” attempted to defeat and evade the true tax, the jury was instructed that a defendant “must be held to know that which it is his duty to know and which he solemnly promulgated * * *.” (R. 1945.) Instead of defining “wilfully and knowingly” for the jury’s guidance, the instruction told the jury that “ordinary diligence” was the standard of conduct by which defendants’ guilt or innocence must be determined. Negligence was enough to convict under the portion of the instruction which said (R. 1945):

“But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith *and ordinary diligence* as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else.” (Emphasis ours.)

Thus the jury must have understood that what they were to determine was whether the defendants would have known their returns were incorrect had they exercised “ordinary diligence.”

The nearest to a definition of wilfulness which can be found in the instructions are occasional references to good faith (R. 1942, 1945), and the following sentence (R. 1941):

“The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendants.”

The effect of this sentence, unfortunately, is entirely submerged beneath the repeated instructions dispensing with actual knowledge of wrong.

The statute and the indictment both require that defendants be proved to have "willfully" attempted to evade. The term "willfully," as used in this very section, has been authoritatively held to mean with "an evil motive." *United States v. Murdock*, (1933) 290 U.S. 389; *Spies v. United States*, (1943) 317 U.S. 492; *Hargrove v. United States*, (CA 5, 1933) 67 F. 2d 820, 90 A.L.R. 1276; *Arnold v. United States*, (CA 9, 1935) 75 F. 2d 144; *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. *United States v. Martell*, 345 U.S. 917.

The Supreme Court decision in *United States v. Murdock*, supra, is the leading case in this area. An individual was convicted under what is now Section 145(a) of wilful failure to testify before a revenue agent, when he refused under the Fifth Amendment to testify because of fear of self-incrimination under state law. The Supreme Court reversed the conviction because the element of wilfulness was not properly explained to the jury. The court held that in tax offenses where wilfulness is an element, "an evil motive is a constituent element of the crime."⁸ The view that in such offences wilfulness denotes an evil motive was adhered to by the Supreme Court in *Spies v. United States*, (1943) 317 U.S. 492, 498, involving Section 145(b).

Another leading case, and one which bears directly on the case at bar, is *Hargrove v. United States*, (CA 5, 1933) 67 F. 2d 820, 90 A.L.R. 1276.⁹ In that case a con-

⁸290 U.S. at 395.

⁹This court cited the *Hargrove* case approvingly in *Arnold v. United States*, (CA 9, 1935) 75 F. 2d 144, involving Sec. 145(a).

viction under the statute here involved (Sec. 145(b)) was reversed, because the trial judge charged that the requirement of wilfulness was met if the defendant acted intentionally, regardless of whether he knew he was acting contrary to law. The court said (67 F. 2d at 823):

“* * * a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence.”

No doubt can be felt, we submit, that a negligent omission by a defendant to satisfy himself that his return was correct is not wilfulness within either the *Murdock* statement of the test or the *Hargrove* statement. A negligent omission is not one with “an evil motive,” and neither is it an act embodying “actual knowledge of the existence of obligation and a wrongful intent to evade it.”

It is settled that wherever wilfulness is construed to require an evil motive, as in tax cases, negligence is not enough to constitute wilfulness. *Lurding v. United States*, (CA 6, 1950) 179 F. 2d 419, 421; *Inland Freight Lines v. United States*, (CA 10, 1951) 191 F. 2d 313, 316; *Browder v. United States*, (1941) 312 U.S. 335, 341-2. This point is therefore not new, and need not rest merely on our interpretation of the *Murdock* and *Hargrove* cases, however clearly necessary that interpretation may appear to be.

The *Lurding* case (supra, 179 F. 2d 419, 421) is indistinguishable from the instant case. There the trial judge had instructed the jury that it was immaterial that the returns had been prepared by another person and not by the defendant, and added that “when a return is signed and filed by a taxpayer it becomes his return and he, in

law, is responsible for that return.” The Court of Appeals held that this instruction was reversible error, saying (179 F. 2d at 421):

“The doctrine of *respondeat superior* is not to be drawn from the law of negligence and applied to criminal liability.”

The combined effect of the paragraphs in the instructions to which we object was clearly contrary to the *Lurding* case.

The instructions cannot be reconciled with these authorities. The charge (R. 1945) that if a false return is made “to defraud the government,” a defendant cannot “escape punishment by disclaiming knowledge of that which he had sponsored,” is virtually the same as that held prejudicial error in the *Lurding* case. This sentence would constitute reversible error even if it stood alone, for in one construction it is erroneous, and in its most favorable aspect it is confusing. Its natural meaning is that the defendants are guilty as a matter of law if the jury believes that any of the persons who prepared the returns or kept the financial records intended “to defraud the government.” More serious is the likelihood that the jury would understand that the defendants could not disclaim knowledge that their returns were false merely because someone else had prepared them, and, of course, if they knew that the returns were incorrect then their intent was “to defraud the government.”

The latter interpretation of that sentence seems to be the more likely one the jury would place on it, because of the content of the sentence which immediately followed

it. That sentence, after first freeing defendants of liability for "innocent clerical mistakes," then stated "he must be held to know that which it is his duty to know and which he solemnly promulgated * * *." This could only mean that defendants *must* be held to have knowledge of what was in their returns; with such a preface, the further admonition that "it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns or not" was a bitter jest. The jury had already been instructed that defendants "must be held to know" of the incorrectness of the returns, and that it would be a "startling situation if" defendants could "escape punishment by disclaiming knowledge" of the contents of their returns.

Any juror who might have been left stubbornly uncertain whether he was being told that in this crime guilt is not personal could not have been left in doubt by what came next. The next paragraph began with these two sentences (R. 1945):

"The duty to file an income tax return is personal. It cannot be delegated to anyone."

If defendants had been charged under Internal Revenue Code Section 145(a) with the misdemeanor of wilfully failing to file a return, these sentences would have been more to the point.¹⁰ Defendants had, however, filed re-

¹⁰They would, however, have been impossible to reconcile with the many cases holding, as a matter of law, that persons who fail to file returns in reliance on expert but mistaken advice are freed from civil penalties. *Fisk's Estate v. Commissioner*, (CA 6, 1953) 203 F. 2d 358; *Burton Swartz Land Corp. v. Commissioner*, (CA 5, 1952) 198 F. 2d 558; *Haywood L. & M. Co. v. Commissioner*, (CA 2, 1950) 178 F. 2d 769; *Orient Inv. Co. v. Commissioner*, (CA D.C., 1948) 166 F. 2d 601; *Hatfried, Inc. v. Commissioner*, (CA 3, 1947) 162 F. 2d 628.

turns, so if these sentences are to be understood to mean something relevant to a charge under Section 145(b), they must mean that the duty to file a *correct* income tax return is personal and cannot be delegated to anyone. It should be sufficient answer to any such proposition that Congress has made no tax defaults criminal unless they are due to "an evil motive." *United States v. Murdock*, supra.

This paragraph in the instructions proceeds, after excusing bona fide mistakes, to charge the jury that (R. 1945):

"But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith *and ordinary diligence* as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (Emphasis ours.)

By the use of the conjunctive term "and ordinary diligence," the charge transformed the crime from wilfulness to negligence. This transformation is utterly erroneous. *Lurding v. United States*, supra; *Inland Freight Lines v. United States*, supra; *Browder v. United States*, supra.

Accordingly, in several different respects the instructions thus denied defendants their right to have the jury decide if their actions were wilful. Unless defendants actually knew, of their own knowledge and not by imputed knowledge, that their actions were wrong, they lacked the "evil motive" necessary to constitute wilfulness. *Hargrove v. United States*, (CA 5, 1933) 67 F. 2d 820, 90 A.L.R. 1276; *United States v. Murdock*, (1933) 290 U.S. 389; *Lurding v. United States*, (CA 6, 1950) 179 F. 2d

419; *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. 345 U.S. 917; *Arnold v. United States*, (CA 9, 1935) 75 F. 2d 144; *Felton v. United States*, (1878) 96 U.S. 699; *Potter v. United States*, (1894) 155 U.S. 438; *Spurr v. United States*, (1899) 174 U.S. 728.¹¹

The second paragraph in the instructions objected to above¹² was the government's requested instruction No. 27. The request cites *Paschen v. United States*, (CA 7, 1934) 70 F. 2d 491, and *Cooper v. United States*, (CA 8, 1925) 9 F. 2d 216, as authority. (R. 16.) The instruction is an incomplete portion of the statement made by the appellate courts in those cases. Moreover, when extracted from the context of those cases, as was done here, its meaning was exactly reversed.

¹¹In the *Felton* case, the Supreme Court reversed a conviction under the internal revenue laws, because the defendants were not shown to have had knowledge that their distilling equipment did not comply with internal revenue laws. The court said: "Doing or omitting to do a thing knowingly and willfully, implies not only a knowledge of the thing, but a determination with a bad intent to do it, or to omit doing it."

The *Potter* case was one in which the Supreme Court reversed a conviction of a bank officer because there was no evidence that the defendant's act was in wilful violation of the law. The court held that the statute required wilfulness, which "implies on the part of the officer knowledge and a purpose to do wrong."

The *Spurr* case, though under a different statute, greatly resembles the instant case. A bank officer was convicted of "willfully" certifying a bad check. His evidence was to the effect that before certifying a check he always asked the cashier or exchange clerk about the status of the account and would rely on the reply. The Supreme Court held that if believed this evidence would be a complete defence and the trial judge erred in not so instructing the jury that they would so understand.

The *Martell* case, a recent decision in which the *Murdock* and *Hargrove* cases were followed, is discussed in the text, *infra* pp. 46-47. It is not a Supreme Court case; the Supreme Court denied the government's petition for certiorari.

¹²*Supra*, footnote 7, pp. 35-36.

In both cases, the defendant was convicted and appealed on the ground, among others, that the jury should have accepted his defence that the fault was not his own but was another's. In each case, the appellate court held that the jury need not believe the defendant's exculpatory evidence. In each case, it used the language given below as an instruction. But where each appellate court used the language to mean that a finding of knowledge was a *permissive* inference, the use of that language in the instruction here converted it into a *mandatory* inference.

Nor is this the full extent of the error; the instruction below was merely an incomplete extract from the quotation.¹³ The appellate courts understood, which the court below did not, that unless their language was qualified it would appear to authorize imputed knowledge. To safeguard against such authorization, the appellate courts added the following admonition, which are the two final sentences of the complete quotation:

¹³The complete quotation is as follows:

"The owner of a business need not be the actual book-keeper, to be familiar with the affairs and finances of that business. It would present a somewhat startling situation if a taxpayer, charged by law with this duty, could sign and file a false return made to defraud the government, and escape punishment by disclaiming knowledge of that which he has sponsored. Of course, he would not be liable for innocent clerical mistakes; but he must be held to know that which it is his duty to know, and which he solemnly promulgates. *We do not by this recognize imputed or presumed knowledge or intent. We merely hold that the situation presented is one from which the jury was entitled to infer knowledge on the part of the defendants.*" (Emphasis added.)

The italicized portion was omitted from the instruction.

This language was first used in the *Cooper* case, and was later quoted in the *Paschen* case. In neither case, of course, was it converted into a mandate to the jury.

“We do not by this recognize imputed or presumed knowledge or intent. We merely hold that the situation presented is one from which the jury was entitled to infer knowledge on the part of the defendants.”

By its omission of any comparable admonition, the court below converted a permissible inference into a mandatory one, and thus took from the jury the issue of wilfulness, instructing the jury in effect that wilfulness need not be proved but should be presumed. This was prejudicial error.

2. The instructions did not specifically state that the paragraphs discussed above were without application to the conspiracy count. The jury was given no reason to believe that the instructions about the nature of the substantive crime charged had no application to the count charging a conspiracy to commit the substantive crime. And, of course, some interdependence between the two is obvious. For example, the element of wilfulness is common to all five counts. (R. 3 to 7.)

The charge at R. 1939 quoted the statutory basis for counts 1 to 4, inclusive, and thereafter to R. 1948 gave instructions relating to those counts. From R. 1948 to the very top of R. 1952 the instructions relate to the conspiracy count, but at that point on R. 1952 there begin four pages which refer equally to all the counts. There is also matter in the pages relating primarily to counts 1 to 4, inclusive, which refers to all five counts. For instance, at R. 1942 are two paragraphs dealing with wilfulness which have as much bearing on the conspiracy count as

on the substantive counts. The same is true of the last paragraph beginning on R. 1943, and the first two on R. 1944. The instruction about reasonable cause begins at R. 1946, before count 5 is introduced, is interrupted and resumes at R. 1953, after count 5 has been explained. Since wilfulness is charged in each count, the jury must naturally have supposed that the paragraphs we object to were meant to apply to all.

Furthermore, the conspiracy charged was one to commit the offenses charged as substantive crimes in counts 1 to 4. The conspiracy count necessarily depends for its meaning on an understanding of counts 1 to 4. An erroneous instruction about the elements of counts 1 to 4 necessarily prevents a correct understanding of count 5.

The instructions are thus filled with the confusing effect which caused reversals in *Spurr v. United States*, (1899) 174 U.S. 728, and *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. 345 U.S. 917. In the *Spurr* case, the trial judge originally gave a clear and unobjectionable instruction explaining wilfulness. The jury returned and asked the judge for a restatement, and what he then told them gave the impression that knowledge of wrong was not a necessary element. The Supreme Court reversed, holding that the necessary effect of the second instruction was to mislead the jury if it had forgotten the first instruction and to confuse it if it had not.

The more recent *Martell* case is to the same effect. That was an income tax indictment under Internal Revenue Code Sections 145(b) and 3793(b)(1). Although the trial judge told the jury that wilfulness was not an element in the charged crime, he also told them a bad purpose was

required. The conviction was reversed because the charge about wilfulness was confusing. The court said that that element of the crime must be clearly explained and a conviction cannot be allowed to stand unless the jury is clearly told that inadvertent error is not enough, and that an intentionally wrongful act, with specific knowledge that the act is wrongful, is necessary. The charge in this case cannot possibly meet that standard.

Accordingly, the jury was not given the clear charge required but was left with a confusing, misleading statement which permeated the instructions relating to the conspiracy count as well as to the substantive counts. A confusing mixture of instructions is reversible error. *Bollenbach v. United States*, (1946) 326 U.S. 607; *Spurr v. United States*, supra; *United States v. Link*, (CA 3, 1953) 202 F. 2d 592, 594; *United States v. Martell*, supra. As the Supreme Court said in the *Bollenbach* case (326 U.S. at 612):

“Particularly in a criminal trial, the judge’s last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.”

Accordingly, the charge below which substituted imputed knowledge for actual knowledge, and negligence for wilfulness, so permeated the instructions on all the counts with error and confusion that the convictions should be reversed on all five counts.

II. THE CHARGE ERRONEOUSLY INJECTED ELEMENTS COVERED BY INTERNAL REVENUE CODE SECTION 145(a), UNDER WHICH DEFENDANTS WERE NOT INDICTED AND AS TO WHICH THE STATUTE OF LIMITATIONS HAD RUN.

Defendants were indicted under Internal Revenue Code Section 145(b) for "wilfully and knowingly attempt(ing) to defeat and evade a large part of the income tax * * * by filing and causing to be filed * * * a false and fraudulent income tax return" (R. 3-6), and for conspiracy to do the same (R. 7). They were not indicted for failure to keep proper records, wilfully or otherwise.

Section 145(a), Internal Revenue Code, makes it a misdemeanor to fail "willfully" to, *inter alia*, keep "such records" as are required "by law or regulations." The statute of limitations on this offence is three years (Sec. 3282, Title 18, U.S. Code), so that any proceeding under it for the year 1947 would have been barred at the time this indictment was brought (R. 8).

The acts which are made a misdemeanor by Section 145(a) are not also made a felony by Section 145(b). *Spies v. United States*, (1943) 317 U.S. 492.¹⁴ Accordingly, the jury should not have been permitted to believe that wilful failure to keep clear records as required by

¹⁴In that case, a defendant was indicted under Sec. 145(b) for wilful evasion. He had had sufficient income during the year to require the filing of a return and the payment of a tax, but he had done neither. He requested, but was denied, an instruction that he could not be found guilty of wilful evasion if all he had done was to fail wilfully to file a return and pay a tax. The Supreme Court held that refusal to give this instruction was reversible error. After considering the complete structure of the civil and criminal sanctions enacted to enforce the tax laws, the court concluded that by Sec. 145(b) Congress meant something more serious than a combination of the acts penalized by Sec. 145(a).

Section 54, Internal Revenue Code, would be sufficient to support the indictment under Section 145(b). The jury was not only permitted to believe that but was made to do so by a confusing and misleading instruction.

In the concluding four pages of the instructions, the trial judge charged the jury with certain general admonitions, such as the presumption of innocence, meaning of reasonable doubt, and the like. Near the beginning of these general admonitions, the judge gave the following instruction (R. 1952):

“Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.”

This instruction was not relevant to the indictment, and its inclusion served only to confuse the issue and mislead the jury.

Even if the crime charged had been under Section 145(a), the foregoing instruction would have been error because it was unaccompanied by any explanation that the failure to keep the required records was not criminal unless it was wilful. *Brink v. United States*, (CA 6, 1945) 148 F. 2d 325, 328. Had the crime charged been under Section 145(a), the situation would have been an exact parallel to *Spurr v. United States*, (1899) 174 U.S. 728, also discussed above, where the jury asked the judge for a restatement of the law governing certification of bad checks. The judge read to the jury the statute prohibiting

such certification but did not inform the jury that that statute did not make such certification a crime and that the one which did so required that the act be wilful. He had, however, previously instructed the jury that wilfulness was required. Nevertheless, the Supreme Court reversed because the sum total of all the instructions did not clearly enough charge the jury that wilfulness was required. Plainly, then, this instruction would have been reversible error had this indictment been under Section 145(a). *Brink v. United States*, supra.

It was even worse, we submit, to leave this mistaken impression with the jury since the failure to keep the required records, even if wilful, would not support a conviction of the crimes actually charged here.

To appreciate fully the extent of the harm this error was likely to do, one must review briefly the evidence before the jury. Erroneous returns were signed by both defendants and filed on their behalf. The prosecution introduced evidence tending to show that defendants had deliberately brought about the chaotic state of their records in order to have an excuse to file inaccurate returns. The defence introduced evidence contradicting the prosecution's evidence about intent, and going further by tending to show that while the records were chaotic it was nevertheless not impossible from them to calculate the defendants' net income correctly.

This instruction, that the law required defendants to keep records sufficient to establish their net income, inevitably distracted the jury's attention from the real issue in the case, i.e., whether there was a wilful attempt to evade. Under this instruction, the jury was justified

in believing that the conflict in the evidence was on an irrelevant point and need not be resolved. The jury was justified in believing that it could convict if it found that the records were so chaotic as not to be "sufficient" to establish the amount of net income.

The conviction should therefore be reversed, as in the *Spies* case, because the charge to the jury did not distinguish between the crimes charged in the indictment, which were under Section 145(b), and those within the scope of other penalty provisions such as Section 145(a).

We do not contend that the jury should not have been given any instructions at all about the effect of chaotic records. An adequate charge on this point was given. See last paragraph beginning at R. 1942, continuing to about the middle of R. 1943. It was unnecessary, and furthermore was misleading and confusing, for the judge to add, nine pages later, nearer the close of his instructions, the erroneous paragraph we are discussing. It was certain to be understood to be an instruction about an independent offence, and coming as it did so much closer to the completion of the instructions, was bound to be fresher in the minds of the jurors, when they began their deliberations, than unobjectionable instructions given nine pages earlier. As the Supreme Court has lately said, "Particularly in a criminal trial, the judge's last word is apt to be the decisive word."¹⁵

The error was prejudicial; the conviction should be reversed.

¹⁵*Bollenbach v. United States*, (1946) 326 U.S. 607, 612, also cited and quoted above.

III. THE TRIAL COURT ERRONEOUSLY FAILED TO INSTRUCT THE JURY THAT DR. MITCHELL'S ACQUITTAL ON SIMILAR CHARGES FOR THE YEARS 1942-1946 CONCLUSIVELY ESTABLISHED THAT NO WILFUL ATTEMPT TO EVADE TAXES HAD BEEN MADE IN THOSE YEARS.

In the trial below, the Government successfully developed a bold strategy: to introduce as much evidence as possible of Dr. Mitchell's understatements of tax and income in his returns for prior years, for the purpose of showing a pattern of conduct. The purpose of the pattern was to create an inference of wilful intent.¹⁶

Much evidence was introduced by the Government concerning the investigation for 1942-1946, the understate-

¹⁶The Government's theory of its case clearly appears from the prosecutor's summation (R. 1764-5):

"In point of fact in the years '38 to '46 Green's investigation ultimately developed that Dr. Mitchell was only reporting about 20 to 25 per cent of his true income.

"For those years Dr. Mitchell reported \$106,000 of income and his actual income was \$472,000.

"Agent Green's investigation further developed that the system or scheme or whatever you want to call it used by Dr. Mitchell in those years was either not filing a return at all or reporting a nominal amount on the return, which had no relation to what he made.

"So much for '38 to '46. That's the starting point."

Again later, the same theory is urged on the jury (R. 1805):

"And, finally, in considering the defense of Dr. Mitchell that he knew nothing, you are entitled to consider the gross understatement—apparently that is an accounting term for when you report 25 per cent of your income—entitled to consider the gross understatement of income for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945 and 1946.

"You can consider those years in passing on the defendant's defense that this whole arrangement in 1947 was an unbelievable and fantastic conglomeration of coincidences; that he never intended to cheat or defraud the government for the year 1947. You can consider this previous history of filing tax returns in passing on that subject.

"So much for the defendant's story."

ments of income for those years, and coloring matter. This evidence was prejudicial in the extreme unless its significance was correctly and clearly explained to the jury.

The instructions entirely failed to inform the jury of the significance it could lawfully attach to this evidence.¹⁷ They fail to instruct the jury that Dr. Mitchell was acquitted of the charge of wilful evasion for the years 1942-1946, inclusive, and that that acquittal was *res judicata* on all issues decided in that case, including the absence of wilful intent to evade in the years 1942-1946. A clear and emphatic instruction to this effect was all that could possibly have overcome the prejudicial effect of the evidence¹⁸ and of the prosecutor's closing argument to the

¹⁷The instructions were (R. 1930-1939, 1944) :

"You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, *nor are you to consider for any purpose whatsoever the result of any previous trial.*"

* * * * *

"The defendants are charged with wilfully attempting to evade income taxes for the year 1947 by filing a false return. Certain evidence has been admitted by me relating to events which occurred in other years. So that there may be no mistake about that, this evidence has been submitted under the rule that acts similar to those charged in the indictment can be proved to show intent when (they) are sufficiently near and so related in kind as to throw light on the question of intent and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose. Evidence of such facts and circumstances, both prior and subsequent, are admissible if not too remote in time." (Emphasis ours.)

¹⁸The defence did not seek to retry the 1942-1946 case by putting before this jury the defences it had successfully urged in the trial for those years. Instead it relied on evidence that the Doctor was acquitted.

jury, in which he argued that the evidence showed a “system or scheme * * * used by Dr. Mitchell in those years” (R. 1764), and further contended that the jury was “entitled to consider the gross understatement of income for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945 and 1946.”

The record in *United States v. Vaughn H. Mitchell*, Docket No. 31950R, in the court below, shows that on February 16, 1949, Dr. Mitchell was indicted on five counts on the charge that he “did wilfully and knowingly attempt to defeat and evade” his income tax for the years 1942 to 1946, inclusive, in violation of Internal Revenue Code Section 145(b). A sixth count indicted him on the charge that he did “wilfully and knowingly attempt to defeat and evade” Mrs. Mitchell’s income tax for 1946, again in asserted violation of Section 145(b). The record in that case also shows that after trial to a jury Dr. Mitchell was acquitted on all counts, and on July 15, 1949 a judgment of not guilty was entered in Vol. 210, Judgments and Decrees, p. 317.

The doctrine of *res judicata* applies to criminal judgments. *United States v. Oppenheimer*, (1916) 242 U.S. 85; *Local 167 v. United States*, (1939) 291 U.S. 293; *Sealfon v. United States*, (1948) 332 U.S. 575; *Emich Motors Corp. et al. v. General Motors Corp.*, (1951) 340 U.S. 558. An acquittal in a criminal case “operates to conclude those matters in issue which the verdict determined though the offenses be different.” *Sealfon v. United States*, *supra*, 332 U.S. 575 at 578.

The question is not one of double jeopardy as prohibited by the Fifth Amendment. At least since *United States v. Oppenheimer*, supra, was decided in 1916, it has been settled that the doctrine of double jeopardy does not swallow up res judicata in the field of criminal judgments. A conviction can be res judicata in a later civil case (*Emich Motors Corp. v. General Motors Corp.*, supra, and *Local 167 v. United States*, supra), and either a conviction or an acquittal may be res judicata in a later criminal case (*Sealfon v. United States*, supra).

It is the duty of the trial judge to examine the record of the prior trial, determine what was decided, and instruct the jury as a matter of law as to the issues which it forecloses (*Emich Motors Corp. v. General Motors Corp.*, supra, 340 U.S. 558 at 571). As the Supreme Court stated the rule in the *Emich Motors* case (340 U.S. at 571):

“It is the task of the trial judge to make clear to the jury the issues that were determined * * * in the prior suit.”

This duty was not performed in the case at bar.

United States v. Adams, (1930) 281 U.S. 202, and *Sealfon v. United States*, supra, make clear what the trial judge should have instructed the jury. In the *Adams* case, a defendant was acquitted on a charge of wilfully making a false entry in a bank's journal ledger. Subsequently he was indicted for wilfully making the same false entry in another bank book on a later date. The Supreme Court denied the pleas of double jeopardy and res judi-

cata, and as to the latter defence, Mr. Justice Holmes said for the unanimous court (281 U.S. 202 at 205):

“(The former) judgment was conclusive upon all that it decided. (Citation omitted.) It establishes that at the time of making the entries, the defendant was not guilty of an intent to defraud the bank or the examiners.”

But, Mr. Justice Holmes added, it does not establish the intent with which he performed the later act, so the indictment for it could be tried.

Thus in the instant case the prior acquittal is not conclusive concerning the intent with which Dr. Mitchell did later acts, i.e., these in 1947 and 1948; but it is conclusive concerning the intent with which he did acts in 1946 and prior years. Acts performed in 1946 and earlier years are conclusively determined to have been innocent of any wilful intent to evade, and therefore they cannot constitute a pattern from which can be drawn an inference of wilful intent to evade. The jury should have been instructed accordingly.

The later *Sealfon* case points the same way, and it, too, was an unanimous decision. It involved a defendant in two contemporaneous indictments, one charging him with conspiracy and the other with being an accomplice in the substantive offence. For some reason, the conspiracy charge was tried first, and the defendant was acquitted. The defendant was then tried on the substantive charge and was convicted, but his conviction was reversed on the ground that the acquittal on the conspiracy count was res judicata of the substantive charge. The Supreme Court stated the issue (332 U.S. 575 at 578):

“Thus the only question in this case is whether the jury’s verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense.”

It stated its conclusion (332 U.S. at 580) :

“So interpreted, the earlier verdict precludes a later conviction of the substantive offense. The basic facts in each trial were identical.”

The court added that the fact that certain additional evidence was introduced against the defendant in the second trial did not affect its conclusion, since that evidence merely tended to prove the same facts which were determined in the first trial.

Accordingly, the prior determination that Dr. Mitchell was not guilty of wilful attempt to evade in the years 1942 to 1946 is conclusive for all purposes between the United States and the Doctor in any later criminal proceeding, and the jury should have been so instructed.

The leading civil cases applying *res judicata* further illustrate the validity of our position. A statement of the scope of the doctrine which is frequently quoted appeared in *Southern Pacific Co. v. United States*, (1897) 168 U.S. 1, 48:

“The general principle announced in numerous cases is that a right, question, or *fact* distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; *and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same*

parties or their privies, *be taken as conclusively established*, so long as the judgment in the first suit remains unmodified." (Emphasis ours.)

The doctrine is more precisely called estoppel by judgment, and where the second suit is for a different cause of action it is more precisely called collateral estoppel. See *Commissioner v. Sunnen*, (1948) 333 U.S. 591, 598, and *Tait v. Western Maryland Ry Co.*, (1933) 289 U.S. 620, 623-624, 626. In the two cases last cited it was recognized that absent an intervening change in the law a decision determining civil tax liability in one year is determinative of the liability for ensuing years, and in any event facts determined in the first case may not be relitigated, because of collateral estoppel, in the later years.

The *res judicata* which is applied to criminal judgments is the type which in civil cases is called collateral estoppel. The *res judicata* which prevents the same cause of action from being retried is called double jeopardy in criminal cases and *res judicata* in civil cases; the extension of the principle of estoppel by judgment whereby the prior determination of the facts is binding on the parties and cannot be relitigated in a different cause of action, which in civil cases is collateral estoppel, is the only kind of *res judicata* which can be involved where a criminal judgment is involved.

As can be seen, the *Sealfon*, *Adams* and *Oppenheimer* cases all involved collateral estoppel, since in each the question presented was whether the prior acquittal was *res judicata* of the facts in a later indictment for a different offence.

We do not, of course, suggest that the doctrine of res judicata prevented the trial of Dr. Mitchell on the 1947 charges. As in *United States v. Adams*, supra, 281 U.S. 202, the acquittal on a charge of acting with wilful purpose in an earlier period does not establish that he may not have had a wilful purpose in a later period. The earlier acquittal does, though, as the Supreme Court recognized in the *Adams* case (281 U.S. at 205), conclusively establish that the Doctor did not have a wilful purpose to evade or defeat the income tax in the years prior to 1947.

Since the prior acquittal conclusively established that the Doctor did not wilfully attempt to evade or defeat the income tax in 1942 to 1946, inclusive, the jury should have been instructed to that effect. Instead of being properly instructed, however, the jury was told:

“You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, *nor are you to consider for any purpose whatsoever the result of any previous trial.*” (R. 1938-1939; emphasis ours.)

This instruction would merely have been an ambiguous way of informing the jury that the prior acquittal did not establish the Doctor's innocence in the present case, were it not for the presence in the record of the evidence offered by the Government to show a prior pattern of wilful understatement. The prosecutor had, however, argued to the jury that in the prior years Dr. Mitchell had used a

“system or scheme or whatever you want to call it * * * (of) either not filing a return at all or reporting a nominal amount on the return, which had no relation to what he made.

“So much for '38 to '46. That's the starting point.” (R. 1764-1765.)

Later the prosecutor returned to the attack by instructing the jury himself, as follows (R. 1805):

“* * * you are entitled to consider the gross understatement—apparently that is an accounting term for when you report 25 per cent of your income—entitled to consider the gross understatement of income for the years 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945 and 1946.

“You can consider those years in passing on the defendant's defense * * *. You can consider this previous history of filing tax returns in passing on that subject.”

The jury was *not* entitled to consider those matters at all, and it was the trial court's duty to correct the prosecutor and instruct the jury what the law actually is.

Instead of correcting the prosecutor's misstatements of law, the instructions proceeded to be affirmatively incorrect themselves. They were not merely silent; they were affirmatively wrong. They told the jury (R. 1939):

“nor are you to consider for any purpose whatsoever the result of any previous trial.”

The error in this instruction was emphasized and repeated five pages later when the trial judge told the jury this (R. 1944):

“Certain evidence has been admitted by me relating to events which occurred in other years. So that there may be no mistake about that, *this evidence has been submitted under the rule that acts similar to those charged in the indictment can be proved to show intent* when (they) are sufficiently near and so related in kind *as to throw light on the question of intent* and are closely related and of the same general nature as the transactions out of which the alleged criminal act arose.” (Emphasis ours.)

Thus the jury was instructed that it was free to conclude that Dr. Mitchell had intended to evade tax in the earlier years, free to ignore “the result of any previous trial,” and from this to infer that he had the same intent in 1947.

The instruction therefore required the jury to ignore the conclusive effect of the prior acquittal on the facts determined therein, and ignored the settled rules of res judicata. This was prejudicial error for which the conviction should be reversed.

IV. REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL JUDGE REFUSED TO PERMIT DEFENDANTS TO CROSS-EXAMINE AN IMPORTANT PROSECUTION WITNESS.

The trial judge refused to permit defence counsel to cross-examine Mrs. Iris Cowart. This witness was called by the prosecution as an adverse witness, thus enabling the prosecution to cross-examine her, with all the attendant advantages. When, however, defence counsel sought to cross-examine this prosecution witness, he was told he could not do so but must examine her as if she were his

own witness. The effect was to arrogate to the prosecution a right normally reserved to the defence; namely, the determination of what witness the defence will call. That the trial judge's ruling was prejudicial error is clear from an examination of the record.

Mrs. Cowart was one of the prosecution's key witnesses, one of the two who were not government agents. Her part in the trial was essential, for it was she who had been named in the indictment as a co-conspirator although not as a co-defendant. During the trial, the prosecution's purpose in so naming her became obvious: since she was a co-conspirator, her statements, that were otherwise hearsay, could be admitted into evidence as competent admissions against the defendants. But this strategy backfired. Although other witnesses had testified to her statements, when Mrs. Cowart herself was called, she was unable to give the prosecution much help. The prosecutor, however, was not unprepared; he had the lesson of a prior trial clear in his mind.¹⁹ Therefore, he called Mrs. Cowart as an adverse witness on behalf of the government and proceeded to develop her testimony by way of cross-examination. Even then he failed to elicit the responses he desired; to fill gaps in her testimony, he produced the transcript of her testimony before the grand jury and proceeded to ask her whether or not she had given designated testimony to that body. When she replied, "Yes," he then read both the question and answer to the *trial* jury.

Presumably this technique was employed for the purpose of impeaching his witness. However, it was used so

¹⁹The trial resulted in a hopelessly deadlocked jury (R. 2000).

extensively, covering sixteen of the thirty-three pages of record devoted to Mrs. Cowart's cross-examination *by the government*, that it suggests the sole purpose for calling her as a witness was to get her grand jury statement before the trial jury (R. 268-270, 270-271, 278-279, 280, 814-818, 818-820, 820-821, 821-822). If this was the prosecution's purpose, it was also betrayed by the prosecutor's evident eagerness to introduce into evidence the whole of her grand jury transcript (R. 284-287, 829, 838). Clearly, such a purpose is improper and requires reversal if it is implemented. The prosecution must confine his use of impeaching material to eliminating the damage caused by the witness; he cannot pursue the witness seeking additional damage for the purpose of "get(ing) before the jury, under the guise of impeachment, an ex parte statement of such witness." *Kuhn v. United States*, (CA 9, 1928) 24 F. 2d 910, 913, cert. den. 278 U.S. 605; *Fong Lum Kwai v. United States*, (CA 9, 1931) 49 F. 2d 19, 20; *Culwell v. United States*, (CA 5, 1952) 194 F. 2d 808, 810; *Young v. United States*, (CA 5, 1938) 97 F. 2d 200, 205, 117 A.L.R. 316; *United States v. Block*, (CA 2, 1937) 88 F. 2d 618, cert. den. 301 U.S. 690.

This, then, was the picture facing defence counsel when the witness was turned over to him for examination: Mrs. Cowart had testified that she had kept the Doctor's books during 1947, had made all of the bank deposits of the Doctor's receipts and had entered into an arrangement with Dorothy Mitchell to give her some of the cash receipts coming into the office without including these receipts in the sums deposited. Furthermore, she testified that she had informed the Doctor of this arrangement

and he had acquiesced in it. The substance of this testimony was embellished by the appearance that it came from a reluctant witness, whose failures of memory had to be prodded by frequent references to her prior testimony and by the further appearance that this reluctance was due to the witness's close personal friendship with Dorothy Mitchell and her relationship as a patient of the Doctor. (R. 264-287.)

Mrs. Cowart was then turned over to the defence for examination. Cross-examination was essential since the most damaging parts of her testimony had been contained in the grand jury extracts. When that testimony had been given, it, of course, had not been tested by cross-examination; only the government had been present at the grand jury hearing and only the government had been permitted to cross-examine her at the present trial (R. 758-759, 824-831, 839-840). Under these circumstances, cross-examination was so obviously essential that defence counsel began his examination in that fashion. The prosecutor brought him up short with an objection that Mrs. Cowart was a witness adverse to the government and therefore the defendants were not entitled to cross-examine her.²⁰ The ensuing colloquy among court and counsel terminated in the following question by defence counsel: "And treat

²⁰The objection was first raised over a leading question asked by defence counsel. The court ruled that he must not ask leading questions of Mrs. Cowart, but must examine her through the medium of direct questions. (R. 758-759, 766, 770, 785, 794, 795-796, 797, 800, 805, 813.) But on cross-examination, leading questions are necessary and proper. *Ewing v. United States*, (CA D.C., 1942) 135 F. 2d 633, 639, cert. den. 318 U.S. 776; *United States v. Montgomery*, (CA 3, 1941) 126 F. 2d 151, cert. den. 316 U.S. 681; *Arnette v. United States*, (CA 4, 1946) 158 F. 2d 11; 3 *Wigmore*, op. cit. § 773.

this witness as practically—I mean, I may not cross-examine?” and the following ruling by the court: “That is correct.” (R. 758-759.)

By this ruling the court subverted the *essential quality* that permitted the prosecution to use Mrs. Cowart’s prior inconsistent statements. Normally the hearsay rule makes incompetent extrajudicial statements, since they cannot be tested by cross-examination. However, an exception has been recognized for prior inconsistent statements of a witness who *has been* or *is presently* subject to cross-examination by the opponent. Since the witness who made the prior statement is on the stand, the opposing party may cross-examine him at length concerning it and hence its competency is established. 3 *Wigmore on Evidence* (3rd ed., 1940) § 1018, 1362. But here only the government was permitted to cross-examine the witness as to her prior statements, also taken on examination by government counsel. As to the prosecution, the statement may have been competent. As to the defendants, it was hearsay. It had never been tested by cross-examination by their counsel.

It was also essential that the defendants cross-examine Mrs. Cowart as to parts, other than those selected by the government, of her testimony before the grand jury; this right was denied to them (R. 758-759, 828-831, 839-840). And it was essential that Mrs. Cowart be cross-examined as to the circumstances under which her grand jury testimony was taken; defendants were deprived of this right also (R. 824-826). It was essential that she be examined as to any personal or family circumstances that might have affected her testimony; defendants were prohibited

from exploring the subject (R. 827-828).²¹ It was essential that her familiarity with the transcript be developed; yet the defence was denied the right to ask her if she had seen the transcript at the last trial (R. 826-827).²²

The error of this ruling is clear. The fact that a witness is labeled adverse by the party calling him cannot deprive the opposing party of the right to cross-examine that witness. This very point was passed upon in *United States v. Michener*, (CA 3, 1945) 152 F. 2d 880, 883.²³ The facts are essentially similar to those of the present case, except the *Michener* prosecutor had not had the advantage of a prior trial and therefore did not *know*, as did the prosecutor below, that the witness would be adverse. However, once the witness had taken the stand, the *Michener* prosecutor realized that his testimony was adverse; on the ground of surprise, he sought and obtained the trial court's permission to cross-examine the witness. He then proceeded to do exactly what the prosecutor below did, namely, to impeach the witness by prior inconsistent statements. At the conclusion of the prosecution's examination of the hostile witness, the court denied defence counsel the opportunity to cross-examine, holding that the witness had already been impeached by the government.

²¹This ruling was made despite the fact that she had testified such circumstances "had a great effect upon (her)."

²²Had the defence actually called this witness and let the government impeach (her) by an inconsistent statement, the defence would have been entitled to ask questions on the above subjects to explain the inconsistencies and to be rehabilitated. *Affronti v. United States*, (CA 8, 1944) 145 F. 2d 3, 7; *United States v. Cory*, (CA 2, 1950) 183 F. 2d 155, 157; 3 *Wigmore*, op. cit. § 1044.

²³Cited at length by Wigmore for the proposition here contended: 3 *Wigmore*, op. cit. (1953 Supp.) § 905a.

This was held to be error. The appellate court stated that since the prosecutor's objective had been to introduce prior inconsistent statements in order to discredit his own witness,

“it remained for the defense counsel to bring out, by means of further questioning, any explanation which might weaken or eliminate entirely the apparent inconsistencies shown by Government counsel. *It is no answer that defendant might have called these witnesses as his own at a later phase of the proceedings * * ** We conclude, therefore, that defense counsel should have been permitted to cross-examine these two Government witnesses to elicit, if possible, statements tending to reconcile the apparent contradiction. *To deny him such right, over protest, was reversible error.*” (152 F. 2d at 884; emphasis added.)

The case of *J. E. Hanger, Inc. v. United States*, (CA D.C., 1947) 160 F. 2d 8, 9, is similar in import. The prosecution had called as its witness an employee of one of the corporate defendants. His examination was short and at its conclusion the court characterized him as a “reluctant” witness in testifying *for* the prosecution. Thereupon the trial court denied to the defence the right to cross-examine. On appeal, in a short, terse opinion, the Court of Appeals reversed the defendants' convictions, holding that it was prejudicial error to deprive defendants completely of their right to cross-examine the prosecution's witnesses.

The application of these two cases to the present situation is clear. The government had called the witness Cowart, not the defence. Hence, the defence was entitled,

as a matter of right, to cross-examine her. *Alford v. United States*, (1931) 282 U.S. 687; *Cossack v. United States*, (CA 9, 1933) 63 F. 2d 511, 516. To deny the defendants that right was even more serious error in the present case than in either the *Michener* or the *Hanger* cases. In the *Michener* case, the court ordered the entire testimony of the witness stricken; that action was not sufficient to save its denial of the right of cross-examination from being reversible error. In contrast, in the present case, Mrs. Cowart's testimony was left in the record for the jury to consider. In the *Hanger* case, the court spoke of "postponing" cross-examination to a later time;²⁴ again its ruling was reversible error. In the present case, cross-examination was denied altogether.²⁵

²⁴Reference is made to the colloquy between Court and counsel reprinted in footnote 2 of the opinion at 9-10.

²⁵The Federal Rules of Criminal Procedure contain no square statement that a party must be given the opportunity to cross-examine his opponent's adverse witnesses. However, the common law does. And under Rule 26 (18 U.S.C.A. Rule 26) matters of trial procedure in federal criminal cases "shall be governed * * * by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience." In civil practice, the rule contended for above seems commonly accepted. For instance, Federal Rule 43(b) of Civil Procedure (28 U.S.C.A. Rule 43(b)), which permits a party to call and to cross-examine a hostile witness, requires that this witness "thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of his examination in chief." (Emphasis added.)

This rule has gained much currency. According to *Minimum Standards of Judicial Administration* (1949) edited by Arthur T. Vanderbilt, presently Chief Justice of New Jersey and formerly counsel for the successful appellant in the *Michener* case, supra, the provision of Rule 43(b) "as to a hostile witness represents

That defendants should have been denied their right to cross-examine the witness seems all the more inconceivable when it is remembered that Mrs. Cowart was more than a mere witness; she had been named as a co-conspirator with defendants. In cases on fours with the present, except for the fact that the co-conspirator or accomplice was not called as an "adverse" witness, the courts have laid down the rule that the defendant is entitled to subject the co-conspirator or accomplice to an "extended" and a "searching" cross-examination. *Moyer v. United States*, (CA 9, 1935) 78 F. 2d 624, 630; *Greenbaum v. United States*, (CA 9, 1935) 80 F. 2d 113, 123. In *United States v. Gordon*, (CA 7, 1952) 196 F. 2d 886 at 888, reversed on another point *sub nom. Gordon v. United States*, (1953) 344 U.S. 414, the court stated:

"(An accomplice) was peculiarly the character of witness requiring the exercise of the most extended freedom of the right of cross-examination."

The reason for this concern of the courts is clear: such a witness is peculiarly subject to pressures which tend to color and distort his testimony. For a classic example of the effect of threats and promises by the prosecution upon a witness possibly liable to criminal indictment in a situation similar to Mrs. Cowart's, see *United States v. Bourjaily*, (CA 7, 1948) 167 F. 2d 993. There, after completing

an almost universal practice" and "are established in state practice in thirty jurisdictions." (at 370).

Civil practice ought not only to serve as evidence of the practice at common law; it also ought to serve as a *minimum* standard for criminal courts. Ordinarily, an accused is given greater procedural protection than his counterpart in civil litigation, for he has much more at stake.

his testimony and after the jury had retired, a witness confessed to the court that his entire testimony in favor of the prosecution had been false; it had been forced from him by his nervousness and fright caused by threats of indictment and of incarceration by the prosecution. Although the court recalled the jury to instruct them to disregard that witness's testimony, it committed reversible error in *denying to the defence the right to cross-examine the witness after he had made this confession*. It is only by cross-examination that such matters as these can be extracted from the witness. *Montgomery v. United States*, (CA 5, 1953) 203 F. 2d 887, 891. To deny the defence that right is to deny it a fair trial.

The defence was thus placed in a quandary by the court's ruling; since the prejudicial matter had already been placed before the jury by the prosecution, and since the court had denied cross-examination, the defence took the only course, except to halt the trial and to plead guilty, available to it, namely, to examine Mrs. Cowart as if she were the defendants' witness. Even then, defence counsel was so hampered in his questioning of the witness about her prior statement that on one occasion he was forced to make her his own witness and was forced to offer into evidence, with the wholehearted support of government counsel, the entire grand jury transcript. (R. 828-860.)²⁶ The transcript was read to the jury against the background of a previous instruction by the court to the jury

²⁶See colloquy between court and counsel at R. 840-841. Mr. Fleming (the prosecutor) had twice before offered the grand jury transcript into evidence, but the court had sustained Mr. Dana's (defence counsel's) objections (R. 284-287, 829, 838). Then, upon

that Mrs. Cowart's prior statements before the grand jury "are made available to you now with their answers by the order of the Court, and you may consider them for what value they may have in your own good judgment." (R. 825-826.)²⁷

Choosing this alternative—to go ahead with a direct examination of Mrs. Cowart and to make her the defence's own witness—did not vitiate the court's prior errors. It is no answer that the denial of the right to

Mr. Dana's attempt to clarify her prior testimony, by reading other portions of the transcript, the following colloquy took place:

The Court: Line 11? Did you say line 11 on page 39?

Mr. Dana: Thereabouts, the next to the last page, your Honor, dealing only with those matters we discussed, without stating them again.

(Court examines transcript.)

The Court: Let the record show that I have, for the second time, read the portions to which counsel has adverted; that I consider them completely irrelevant. You may not develop it.

Mr. Dana: Counsel, do you want to offer this into evidence, the entire transcript now?

Mr. Fleming: No. I made my offer and the Court passed on it.

Mr. Dana: We offer the entire thing in evidence, since we have the ruling twice on this matter. Counsel offered it a moment ago. The Court has ruled. I would like to make the same offer.

Mr. Fleming: I have no objection.

The Court: In the absence of objection, it will be received into evidence.

²⁷That this is an extraordinary charge is readily established by a comparison of it with the attitude of the Supreme Court toward prior inconsistent statements. "Of course," spoke the Court in *Southern R. Co. v. Gray*, (1916) 241 U.S. 333, 337, "the contradictory statements can have no legal tendency to establish the truth of their subject matter." Accord, *Hickory v. United States*, (1894) 151 U.S. 303, 309; *Bridges v. Wixon*, (1945) 326 U.S. 135, 155; *Culwell v. United States*, (CA 5, 1952) 194 F. 2d 808, 811. And in each of these cases, unlike the present case, the opponent had had the chance to test the validity of the prior statement by cross-examination in the trial in which it was introduced.

cross-examine was harmless because the cross-examiner can call the witness as his own and thereby take his testimony on the point. *Heard v. United States*, (CA 8, 1919) 255 F. 829; *United States v. Michener*, supra; *J. E. Hanger, Inc. v. United States*, supra; *United States v. Bourjaily*, supra. Denial of the right of cross-examination is in itself error—prejudicial error. *United States v. Alford*, supra; *Lindsey v. United States*, (CA D.C., 1942) 133 F. 2d 368. The convictions below of the defendants should therefore be reversed.

V. THE CONVICTIONS SHOULD BE REVERSED BECAUSE A JUROR WAS NOT DISMISSED ALTHOUGH HE ADMITTED TO A BIAS FORMED FROM NEWSPAPER ACCOUNTS OF DEFENDANTS' FIRST TRIAL.

The Sixth Amendment guarantees to persons accused of crimes a trial “by an impartial jury”. Of this requirement, the Supreme Court has repeatedly said (*Dennis v. United States*, (1950) 339 U.S. 162, 172; *United States v. Wood*, (1937) 299 U.S. 123, 145-146):

“Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.”

The meaning of impartiality is that the jurors “shall have no fixed opinion concerning the guilt or innocence of the one on trial, and that their ultimate verdict shall be based upon the facts as they are submitted to them * * *.” *Baker v. Hudspeth*, (CA 10, 1942) 129 F. 2d 779, 782. Or,

as stated in *Reynolds v. United States*, (1879) 98 U.S. 145, 157, impartiality means the absence of "a positive and decided opinion," regardless of whether it had previously been expressed.

Abraham H. Hershler, a prospective juror, was examined by the court on *voir dire* after the defence had exhausted its peremptory challenges. (R. 59.)²⁸ An analysis of this examination discloses that the juror was not impartial. His "state of mind" included a bias which he had difficulty in measuring precisely, but which perturbed him enough so that he volunteered his concern about it.

Mr. Hershler's disclosure was not in answer to a direct question about a prior opinion. He was asked if he could "independently exercise(ing)" his own judgment, and it was in answer to that question that he volunteered "one qualification." This qualification was that he had followed closely the newspaper accounts of the first trial and as he read them he had formed an opinion of the "guilt or innocence of these defendants." In response to a direct question about his present opinion, he gave this troubled response (R. 58):

"Well, I would say presently I don't have any opinion. I don't suppose. I don't know unconsciously whether I may have or not. I don't know."

The judge's next question did not state the crucial inquiry in the approved form: the judge did not ask if

²⁸See Appendix, *infra*, pp. ii, iii, for text of relevant portions of the examination.

this opinion would "influence his verdict,"²⁹ or if "evidence would be required to overcome this opinion."³⁰ Instead, the question asked could have been answered as the prospective juror did answer it, even if the answer to the crucial question in either of the approved forms would have been such as to disqualify him.

The question asked was (R. 58) :

"But, in other words, you are going to listen to the evidence, if you are selected here, and make up your mind when all the evidence is in and you have heard the arguments of counsel and the instructions of the Court; is that correct?"

"A. Correct."

This question could have been conscientiously answered in the affirmative even though the juror would have admitted, had he been asked, that his opinion "would influence his verdict," and "evidence would be required to remove" it.

Accordingly, at the request of the defence, the trial court asked the prospective juror if he "would * * * be willing to have your case determined and passed upon by a jury composed of 12 people whose frame of mind is the same as yours at the present time?" (R. 59.) After asking the difference between "willing" and "prefer" and being told there was none, the prospective juror replied to the question (R. 59) :

"I would be willing, but I wouldn't prefer it."

²⁹*Reynolds v. United States*, (1879) 98 U.S. 145, 156.

³⁰*The Anarchists' Case*, (1887) 123 U.S. 131, 173-174.

The trial court then transmitted another question as requested by the defence (R. 59):

“The Court: Would you prefer not to?

“A. I would prefer not to. I would prefer to have it tried by the judge.”³¹

Except for the juror’s distinction between “willing” and “prefer,” the examination revealed precisely the same state of mind as was held to preclude “impartiality,” in *Fitts v. Southern Pacific Co.*, (1906) 149 Cal. 310, 86 Pac. 710. In that case the California Supreme Court reversed a trial court in a civil case for permitting a juror to serve where he had acknowledged he would not be willing to have his case tried by a juror who felt as he did. We submit the result should be the same here.

Another case directly in point is *People v. McQuade*, (1888) 110 N.Y. 284, 18 N.E. 156, 1 L.R.A. 273, which like the instant case, involved the retrial of a case where the jury had been unable to reach a verdict at the first trial. One of the jurors, Davis, testified that he had formed an opinion from the newspaper accounts of the first trial, and “if the evidence proved to have been correctly reported,” that would still be his opinion.³² He then stated that his opinion would not cause him to discredit witnesses’ testimony, but he was not certain that he would not be unconsciously influenced by his opinion,

³¹The defence then challenged Mr. Hershler for cause, which the trial court denied. (R. 60.) Soon thereafter, and before the trial began, the defence renewed the challenge for cause and was again refused (R. 60-63).

³²18 N.E. at 161-162.

and he could not say what effect it would have on his verdict if the evidence left his mind in doubt.³³

The New York Court of Appeals reversed the conviction because of the presence of juror Davis and another biased juror on the jury. The court said:³⁴

“Fairly construed, their declaration of their belief that they could render an impartial verdict was qualified by a doubt, and was not sure and absolute. The defendant was at least entitled to a certain and unequivocal declaration of their belief that they could decide the case uninfluenced by their previous decisions; * * *.”

The similarity between the attitudes of juror Hershler and juror Davis is striking. Juror Davis said, “I might be unconsciously influenced. I do not know. I think it would not influence.” Juror Hershler said, “Well, I would say presently I don’t have any opinion. I don’t

³³The complete text of the relevant portion of Davis’ voir dire examination is as follows (18 N.E. at 162):

“Q. You think your present opinion would not affect the weight or influence that you might give to the evidence in this case as it was delivered from the witness stand? A. I think it would not. I might be unconsciously influenced. I do not know. I think it would not influence. Q. Do you suppose that if the evidence, as delivered by the witness on this trial, should leave your mind somewhat in doubt as to the verdict at which you should arrive, would your present opinion influence you in that event one way or another? A. I do not know how to answer that question. If it left my mind in doubt, I should not want to vote either way. Q. Well, suppose you should find yourself in that position on this trial, should your present opinion influence or guide your action at all. A. It might. Q. Do you believe it would in that event? A. Well, I really could not say what effect it would have. Q. Are you in doubt as to what effect it would have? A. I am, and am not able to say what effect it would have in that event.”

³⁴18 N.E. at 163.

suppose. I don't know unconsciously whether I may have or not. I don't know." We are unable to see how either of these jurors can be held to be impartial without concluding that the other one was also impartial. Yet the Court of Appeals held Davis was not a qualified juror. The same conclusion should be reached concerning juror Hershler.

This is not a case where a juror was asked pointblank if he could reach a fair and impartial verdict and a decision disqualifying him would need to be reached in the face of a satisfactory answer to that crucial question. As we have already pointed out, no such crucial question was unequivocally asked here. Yet even where such crucial questions have been asked and satisfactorily answered, convictions have been reversed because jurors had taken their oaths while in possession of distinct opinions based on newspaper accounts. *Coughlin v. People*, (1893) 144 Ill. 140, 33 N.E. 1, was such a case, and *Scribner v. State*, (1910) 3 Okla. Cr. 601, 108 Pac. 422, 35 L.R.A. (NS) 985, was another.

The importance of Mr. Hershler's prejudgment is evident from the fact that he became foreman of the jury. (R. 22.) His selection as foreman is not only evidence of the respect in which his fellow jurors held him but also means that the jury conducted its deliberations with Mr. Hershler in a strategic position to make his views known and felt when they would have the most weight. We think his conduct on voir dire shows him to be an earnest and sincere man, honestly troubled by his possession of a prejudgment. Such a man would, however, feel conscien-

tiously bound to see that the jury reached the verdict which he thought was right. He would be out of character, therefore, if he did not use his foreman's prestige and influence to convict.

Finally, defendants must be given the benefit of any doubt arising from the ambiguities in the examination, because they had no right to conduct the examination, through counsel or otherwise. Rule 24(a), Federal Rules of Criminal Procedure, permits the trial court to monopolize the questions on voir dire, and Rule 14 of the Rules of Practice of the District Court of the United States, Northern District of California, states that the court alone will examine prospective jurors.³⁵

As we have previously noted, the juror was not asked directly and unequivocally if his opinion would survive until overcome by evidence, or if his opinion would affect his verdict. His statements are therefore ambiguous at best. The clearest expression of his state of mind came when, in response to a request from defence counsel, the court asked the prospective juror if he would prefer not to be tried by a jury composed of persons in his "frame of mind," and he replied that he "would prefer not to." Defence counsel promptly challenged him for cause (R. 60), but the court denied the challenge without renewing the examination. Accordingly, the qualifications of juror Hershler must be judged on the basis of his own admission that he did not know whether he was free from bias

³⁵Rule 14. Examination of prospective jurors shall be by the Court alone. If counsel on either side desires that additional matter be inquired into, he shall state the matter to the Court, and if the matter is proper, the Court shall conduct the examination.

but he did know that he was not the kind of juror he would want on a jury which was trying him. On that basis, he was not an impartial juror.

VI. THE COURT ERRONEOUSLY REFUSED TO PERMIT DEFENDANTS TO INSPECT A STATEMENT USED BY THE PROSECUTION TO IMPEACH ONE OF THEM.

Having taken the stand on his own behalf, the defendant, Dr. Mitchell, was subject to a searching cross-examination by the prosecution. (R. 1653-1727, 1750.) For the purposes of impeachment, the prosecutor asked the Doctor to admit making a statement to the government concerning this case on November 13, 1950. Counsel for the defence then asked to see the document; his request was denied.³⁶ Having obtained the Doctor's admission that he had made the statement, the prosecutor proceeded

³⁶“Mr. Dana (defence counsel): I think the witness in all fairness, and under the code, where a witness is being interrogated about a document, that he is entitled to see it before he is questioned about it.

“The Court: He is proceeding properly and laying a foundation. I assume the document will be produced.

“Mr. Dana: May I see it? I have not seen it.

“Mr. Fleming (prosecutor): I submit it is improper for counsel to see a document which is being used for impeachment, contains prior inconsistent statements.

“The Court: That is right.

“Mr. Dana: If counsel wishes it, I have no objection because it would be important for the jury to see what is in it. But I am sure I have a right to see it, especially under the federal rules.

“The Court: I will not allow you to do that when the document is being used for impeachment.

“Mr. Dana: You mean the witness may see it without counsel seeing it?

“The Court: That is right.”

(R. 1686-1687.)

to quiz him about specific questions and answers contained in the statement. Again defence counsel objected, asking to see the statement. Again his request was denied.³⁷ Objection was further made and overruled when the defendant indicated that the prosecutor was taking questions and answers out of context.³⁸ In a measure of desperation at prosecutor's insistence on reading individual questions and answers without permitting explana-

³⁷“Q. (By Mr. Fleming): Now, at that time, under oath, were you asked this question and did you give this answer?”

“Mr. Dana: Just for the record, your Honor, before any part of it is read into evidence is concerned, I submit that counsel for the defendant should be allowed to look at the part they refer to.

“The Court: Not when the document is being used for purposes of impeachment.

“Mr. Dana: But I have no way of knowing anything concerning the contents. I have no copy of it. I submit that counsel for the defendant should be allowed to look at anything before it is read into evidence, even though it be used for impeaching purposes. I mean, there is no secrecy—

“The Court: I have ruled upon that, Mr. Dana.”

(R. 1688.)

³⁸“Q. Is that the question and answer which you gave at that time?”

“A. To arrive at that answer, Mr. Fleming, is like taking one statement out of paragraph. Why don't you read from page 3 down, which will explain that answer thoroughly?”

“Q. Well, was that the answer you gave to the question?”

“A. Certainly, but that is no answer at all.

“Mr. Dana: I submit, your Honor, without the context, it is absolutely—

“Q. (By Mr. Fleming): When is the first—

“Mr. Dana: —immaterial, it is unintelligible. ‘You never up to that time’—that doesn't mean anything to anybody.

“I want the record to show that there is a refusal on the part of counsel, and no criticism of the Court's ruling, to let us see what is in it. ‘Up to what point or what time’—I don't know what he is talking about.

“The Court: The objection will be overruled.”

(R. 1688-1689.)

tions, defence counsel next asked that the document used by the prosecutor be marked for identification. His request was denied. (R. 1690-1691.)

By techniques such as this, the defendants were denied a fair trial.³⁹ No error could be more obvious than that committed below. It is elementary that the defence has an absolute right to see a document used in court by the prosecution for the purpose of impeaching a witness.⁴⁰ *The Charles Morgan v. Kouns*, (1885) 115 U.S. 69, 77; *Chicago, M. & S. P. Ry. Co. v. Artery*, (1890) 137 U.S. 507, 520.

What other guaranty of genuineness is there unless the cross-examiner be compelled to disclose the document from which he purports to read? How else can the court, the jury and the opposing party assure themselves that the document is not a fabrication? It was precisely to eliminate tactics such as these that the modern rules of procedure have been adopted. Under them, trials are not games to be played between opposing counsel. Their aim is to ensure that substantial justice be done between op-

³⁹The tragic absurdity of the prosecutor's willingness to argue the court below into committing reversible error is proven by his statement based on matters dehors this record that no error had been committed since "the defense was allowed to see the statement at the first trial * * *." This statement is contained in the Memorandum of Points and Authorities (p. 7, l. 19-20) filed with this Court over the prosecutor's signature on behalf of the government in response to the defendants' motion to grant bail.

⁴⁰Even had the prior statement not been used by the prosecution for impeachment, the defence was entitled to have it produced for its and the court's inspection. Having been shown the statement was in existence, was readily available, was taken of the witness and was contradictory on relevant matters, the court below committed reversible error in refusing to compel its production. *Gordon v. United States*, (1953) 344 U.S. 414, discussed in detail under our next point.

posing parties. To accomplish that purpose, they chose two fundamental concepts: adversary presentation coupled with full disclosure. The first is necessary for thorough and effective representation of the parties. But the second is just as necessary to prevent trials from degenerating into sparring matches or "trial by counsel's wits." In order, then, to obviate surprise, to prevent suppression of evidence and to require that the court be apprised of *all* the facts,⁴¹ the second concept, that of full disclosure, is an essential and fundamental part of trial procedure. The modern Federal Rules of Criminal Procedure accomplish this end by such devices as preliminary examinations (Rule 5), bills of particulars (Rule 7), depositions (Rule 15), discovery (Rule 16), and inspection (Rule 16). Under these rules, for instance, the present defendants would unquestionably have been entitled to examine the statement in question had they brought, prior to trial, the proper proceeding for discovery and inspection or for enforcing their right to a subpoena *duces tecum*. *Bowman Dairy Co. v. United States*, (1951) 341 U.S. 214. Neither rule is limited in its application to times prior to trial;⁴²

⁴¹Apropos of this statement is language in *Griffen v. United States*, (CA D.C., 1950) 183 F. 2d 990, 993: "However, the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." See also *Berger v. United States*, (1935) 295 U.S. 78, 88.

⁴²Rule 16, set forth in full in the Appendix, *infra*, provides, in part, as follows: "Upon motion of a defendant *at any time* after the filing of the indictment * * * the court may order the attorney for the government to permit the defendant to inspect * * *." (Emphasis ours.)

Rule 17(c), also set forth in the Appendix, provides, in part, as follows: "A subpoena may also command the person * * * to

the force of both rules would therefore apply to the present trial in which the demand for production and inspection was made *after* the trial had commenced.

Moreover, the courts have recognized and enforced this elemental policy of fair play in precisely the situation which confronted the court below: where a statement is used on cross-examination to impeach a witness, the opposing party may inspect and introduce into evidence other portions of that statement. *Affronti v. United States*, (CA 8, 1944) 145 F. 2d 3, 7; *United States v. Corrigan*, (CA 2, 1948) 168 F. 2d 641, 645; *Powers v. United States*, (CA 5, 1923) 294 F. 512, 514; *Jones v. United States*, (CA 9, 1908) 162 F. 417, 431, cert. den. 212 U.S. 576; *Cafassaro v. Pennsylvania Ry. Co.*, (CA 3, 1948) 169 F. 2d 451, 453; *Stanley v. Beckham*, (CA 8, 1907) 153 F. 152, 154; *Wright v. Bragg*, (CA 7, 1899) 96 F. 729, 733, cert. den. 186 U.S. 486; 7 *Wigmore on Evidence* (3rd ed., 1940) §§ 2094, 2113, 2114.⁴³

Thus, in denying the defendants their basic rights, first, to inspect the statement and second, to introduce it into evidence, the court below committed prejudicial error for which it should be reversed. *Gordon v. United States*,

produce * * *. The court may direct that books, papers, documents or other objects * * * be produced before the court at a time prior to trial *or prior to the time when they are to be offered in evidence* * * *. (Emphasis ours.)

⁴³“But there is and could be no difference of opinion as to the opponent’s right, if only a part has been put in, himself to *put in the remainder*. * * * The right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.” (7 *Wigmore* at 523.) See, also, 3 *Wigmore*, op. cit., §§1044, 1045; *Home Benefit Association v. Sargent*, (1892) 142 U.S. 691, 695.

(1953) 344 U.S. 414; *United States v. Krulewitch*, (CA 2, 1944) 145 F. 2d 76, 79;⁴⁴ *United States v. Grayson*, (C.A. 2, 1948) 166 F. 2d 863, 870; *Asgill v. United States*, (CA 4, 1932) 60 F. 2d 776, 779.

VII. THE CONVICTION SHOULD BE REVERSED BECAUSE THE COURT REFUSED TO ORDER THE PROSECUTION TO PRODUCE CERTAIN EVIDENTIARY STATEMENTS TAKEN BY IT OF THE WITNESSES, OR USED BY THE WITNESSES TO REFRESH THEIR RECOLLECTION.

The prosecution called as witnesses several treasury agents who had participated in investigations of the Doctor's affairs. One of these, Special Agent Whiteside, testified at length that he had interviewed certain of the other witnesses called in the case and had taken written statements from some of them. Specifically, Mr. Whiteside testified on direct examination that he had taken a statement under oath from Dr. Mitchell on November 13, 1950, and testified to certain admissions made by the Doctor in this statement. On cross-examination, the defence, referring to the same statement, asked for it to be produced. The prosecution admitted that the statement was in court but, with the court's approval, denied the defence's request to see it. (R. 547-554, 590-591.)

Similarly Mr. Whiteside testified that he had taken a statement from Mrs. Iris Cowart on August 25, 1950,

⁴⁴"Moreover, although Joyce on her cross-examination swore that the statement she had given the agent was false throughout, such testimony has never been regarded as an equivalent of the contradictory statement itself. * * * Finally, we cannot disregard the error. One jury had already disagreed." (145 F. 2d at 79.)

and answered questions about its contents. Again the prosecution admitted that the statement was in court, but refused to produce it. The court again sustained the government's position, although Mrs. Cowart had previously been on the stand as a government witness. (R. 595-598.)

The court committed the third in this series of errors in refusing to uphold the defence's demand for the production of Mrs. Jean Pierson's statement, another of the witnesses who had been examined previously. Mr. White-side testified that witness Pierson had given the government a statement on October 24, 1949, which was present in court, but the court refused to order its production. (R. 598-605.)⁴⁵

The error of the court's ruling is clear. *Gordon v. United States*, (1953) 344 U.S. 414. In the *Gordon* case, the Supreme Court was faced with a situation similar to that facing this Court. The petitioners, Gordon and MacLeod, had been convicted of a federal crime. Their convictions depended, in large part, upon the testimony of an accomplice who had pleaded guilty to the same

⁴⁵In the case of the witnesses Cowart and Pierson, the prosecutor recognized the right of defendants to see the statements, by conditionally offering them into evidence, if the defence were agreeable (R. 597-598, 604-605). Of course, the defendants would have had to consent to the statements "sight unseen." This by-play seemed to be attractive to the court too; it carefully informed defence counsel, while ruling against his demand for production, that "That's one way of seeing it, getting it in evidence." (R. 597-598.) Needless to say this persiflage cannot obscure defendants' rights to a fair trial. It is stated in *Gordon v. United States*, *infra*, that "Demands for production and offers in evidence raise related issues but independent ones, and production may sometimes be required though inspection may show that the document could properly be excluded." (344 U.S. at 418.)

crime. During the course of his cross-examination of this witness, defence counsel established that the witness had made three or four prior statements, which had not implicated the defendants. The petitioners demanded these statements, but their request was denied by the trial court. This ruling was held to be reversible error.

The Supreme Court pointed out that the defence had laid a foundation for demanding the statements; defence counsel had established that the statements (1) were in existence, (2) were in possession of the government, (3) were made by the witness, and (4) were contradictory of his present testimony on relevant and material matters. Under these circumstances the trial court should have ordered the statements to be produced. As Justice Jackson, speaking for a unanimous Court, aptly phrased it,

“For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless.” (344 U.S. at 420.)

The convictions of Gordon and MacLeod were thereupon reversed.

Similarly the defendants in the present case are entitled to have their judgments of conviction set aside. Defence counsel, as pointed out above, laid a foundation requiring the government to produce the statements adverted to. Specifically, in the case of Dr. Mitchell the

record shows (1) that his statement was in existence, (2) that it was present in court in the government's possession, (3) that it was made by Dr. Mitchell, a witness, and taken by Mr. Whiteside, the witness then on the stand, and (4) that it concerned relevant and material matters testified to by Mr. Whiteside, namely, Dr. Mitchell's prior admissions. Mr. Whiteside was not very positive about these admissions, qualifying his answers with "it is my recollection," "I believe so," and "to the best of my knowledge". (R. 548-550.) By these phrases, witness Whiteside indicated an unsureness of the Doctor's admissions that demanded the production of the best evidence available, namely, the Doctor's written statement.⁴⁶

The same is true of Mrs. Cowart's statement; defence counsel established its existence, its availability and part of its contents. Again the witness, Mr. Whiteside, was vague about its exact contents, testifying, "I believe," "I think I was there," "I don't think," "I don't recall that." (R. 595-596.) Despite the compelling necessity for its production to check Mr. Whiteside's recollection on matters germane to the defendants' guilt or innocence, the court denied defendants' request to see it.

⁴⁶It was pointed out in *Gordon v. United States*, supra, that even where the witness has admitted the prior inconsistency, his statement containing that inconsistency ought to be produced "because it will best inform them (the jury) as to the document's impeaching weight and significance." (344 U.S. at 421.) In a footnote (No. 15) to this statement, Justice Jackson adds,

"The best evidence rule is usually relied upon by one opposing admission, on the ground that the evidence offered by the proponent does not meet its standards. Its merit as an assurance of the most accurate record possible commends its extension to this unique situation where it is the proponent who seeks to rely on it." (Id.)

Mrs. Pierson's statement was admitted to be in existence and to be readily available but its production was denied. The defence's purpose, in seeking to examine this statement, was to learn whether Mrs. Pierson had been subjected to threats and promises by the prosecution, a matter denied by both of the witnesses, Mrs. Pierson and Mr. Whiteside.⁴⁷ (R. 471, 511, 598-604.)

Having identified these statements, having shown that they were in the government's possession, and having shown that they had possible evidentiary value, the defence was entitled to have the court order these statements produced in order that they might be inspected for their value to the defendants. *Bowman Dairy Co. v. United States*, (1951) 341 U.S. 214. The court's denial of defendants' demand for their production constitutes reversible error. *Gordon v. United States*, supra.

The court erred in another respect during the course of Mr. Whiteside's testimony. During cross-examination by the defence, the witness testified about the approximate amount of figures contained in a government report. Thereupon the prosecution furnished the witness with a copy of the report. After the witness had identified it as his report dated March 15, 1950, the defence asked to see it. The prosecutor refused the request but again made his conditional offer of the report into evidence, if defence counsel agreed without seeing it. Defence counsel asked to have it marked for identification. Both requests of the defendants were denied. (R. 612-614.)

⁴⁷Mrs. Pierson had formerly testified about its contents (R. 481-484).

Contrary to the rulings of the court below, it is now well established that the defence is entitled to see memoranda or reports used by a government witness to refresh his recollection. *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150, 231-237; *Montgomery v. United States*, (CA 5, 1953) 203 F. 2d 887, 893-894; *Little v. United States*, (CA 8, 1937) 93 F. 2d 401, 405-407, cert. den. 303 U.S. 644; *Fifth Avenue-Fourteenth Street Corp. v. Commissioner*, (CA 2, 1945) 147 F. 2d 453, 458; *United States v. Caserta*, (CA 3, 1952) 199 F. 2d 905, 909; *Wigmore on Evidence*, (3rd Ed., 1940) §§762-765. By this ruling, substantial prejudice was inflicted by the court upon defendants. In connection with an approximation of the defendants' asserted civil liability made by the witness on cross-examination,⁴⁸ the prosecution handed the witness his report saying that it would contain the figure. At that point, request was made for its production. The request should have been granted. When a document is handed to the witness, as the Supreme Court pointed out in *United States v. Socony-Vacuum Oil Co.*, supra, at 233,

“The material so used must be shown to opposing counsel upon demand * * *. And the reasons are that only in this way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and ‘detect circumstances not appearing on the surface’ and ‘expose all that detracts from the weight of testimony.’ (citing Wigmore)”

⁴⁸The figures dealt with were amounts of unreported income; for this proceeding, the prosecution chose \$26,000, but for the civil proceeding, the witness testified, the figure “would be about \$31,000,” a figure “not provable in court.” (R. 612.)

To deny defendant's request under these circumstances was reversible error. *Montgomery v. United States*, supra; *Little v. United States*, supra; *Fifth Avenue-Fourteenth Street Corp. v. Commissioner*, supra.

The judgments of conviction below should therefore be reversed.

VIII. THE COURT COMMITTED REVERSIBLE ERROR IN PERMITTING THE PROSECUTION TO INTRODUCE EVIDENCE, OVER OBJECTION, OF DEFICIENCIES IN INCOME TAXES FOR OTHER YEARS.

During the course of the prosecutor's direct examination of Treasury Agent Green, who was called as the government's third witness, government counsel asked for information concerning the witness' investigation for the years 1938-1941. The defence made timely objection, claiming that the years 1938-1941 were immaterial. The objection was overruled and the prosecutor quickly established that the defendants' deficiency in tax and penalties for the years 1938-1946 was \$276,000. The witness further testified that the defendants' net income for that period was reported as \$106,000, corrected to \$472,000, a difference of over \$350,000. (R. 262-264.)

On redirect examination of this witness, defence counsel offered the court a second opportunity to correct its ruling. When the prosecution again explored the years 1938-1941, the defence again offered the objection that it was immaterial and pointed out to the court that it was

prejudicial. The objection was again overruled⁴⁹ and the prosecution proceeded to develop the defendants' underpayments for 1938-1941 on a year-by-year basis. In addition, the witness volunteered the fact that the government had no record of the Doctor's return for 1938, implying that none had been filed. Finally, from this witness, the prosecution brought out the fact that he had "determine(d) a 50 per cent fraud penalty" for the prior years including 1938-1941. Counsel for the defence not only objected but asked that the question be assigned as prejudicial misconduct. (R. 385-390.)⁵⁰

By admitting this evidence,⁵¹ the court below committed prejudicial error as to both defendants. However, their

⁴⁹The prosecutor mistakenly argued in support of his question that the defendants had "opened up" the subject of 1938-1941 by introducing their Exhibit B. A perusal of Exhibit B, part of the record on appeal, shows the falsity of this argument; it relates only to the years 1942-1946.

⁵⁰Had the evidence related to the year on trial, it clearly would have been error for the witness to indicate his opinion that civil fraud had been perpetrated. *Local 36 v. United States*, (CA 9, 1949) 177 F. 2d 320, 333, cert. den. 339 U.S. 947; *Shreve v. United States*, (CA 9, 1939) 103 F. 2d 796, 812, cert. den. 308 U.S. 570. Its receipt, being prejudicial in nature and being based upon civil issues not before the court, would have constituted reversible error. *Greenbaum v. United States*, (CA 9, 1935) 80 F. 2d 113, 121; *United States v. Michener*, (CA 3, 1945) 152 F. 2d 880, 883; *United States v. Ward*, (CA 3, 1948) 169 F. 2d 460, 461, 462; *Continental Casualty Co. v. First Nat. Bank of Temple*, (CA 5, 1941) 116 F. 2d 885, 887, cert. den. 313 U.S. 575. Since the evidence related, in fact, to the years 1938-1941, the auditor's conclusion that "civil fraud" had been committed in those years was even more startling error than if it had related to 1947.

⁵¹The court below permitted the prosecution to go over this evidence in detail a third time during the course of its cross-examination of Joseph A. Lukes, the Doctor's accountant hired in 1947. Again objection was made by the defendants. After having developed each year from 1938 to 1941 from this witness, the prosecution then summed up its position by asking, "1938,

position on this issue is not the same, because Dorothy Mitchell had no connection whatsoever with the Doctor's tax returns and tax liabilities for the years 1938-1941. She did not marry him until November 10, 1944. (R. 1449.) Nor is there any other evidence in the record to connect her with the Doctor's tax affairs for these years. Consequently, the evidence could have no possible bearing on her guilt or innocence in filing her 1947 tax return. Therefore it was reversible error for the court below to receive this evidence as to defendant Dorothy Mitchell. *Wolcher v. United States*, (CA 9, 1952) 200 F. 2d 493, 497.

The same conclusion must be reached as to the defendant Dr. Mitchell. To a limited extent, it is true, evidence of prior evasions of tax may be admitted "to show his (the defendant's) intent to act wilfully, his intention, and his state of mind." *Himmelfarb v. United States*, (CA 9, 1949) 175 F. 2d 924, 941, cert. den. 338 U.S. 860.⁵² However, such evidence must be used with extreme caution.

1939, 1940 and 1941, then, those were all years of successful tax evasion, is that correct?" After receiving a negative response, the prosecution was allowed to impeach this witness, on a clearly collateral point, by introducing into evidence as U.S. Exhibit 52 his summary of the Doctor's increase in net worth from 1938 to 1946. (R. 1202-1222.)

This evidence was brought out a fourth time by the prosecutor, over objection, in his cross-examination of Dr. Mitchell. On this occasion, the years 1934-1937 were added to the prosecutor's list. (R. 1666-1677.)

⁵²In this case *Himmelfarb* and another had been indicted for tax evasion for 1942, 1943 and 1944. Prior to the trial, the counts for 1942 and 1943 were dismissed as to the other defendant. Both defendants were found guilty for 1944, but *Himmelfarb* was acquitted for 1942 and 1943. Thereupon *Himmelfarb* sought a reversal, claiming that the trial court had erroneously received evidence of his actions in 1942 and 1943. This court, in sustaining the convictions, then laid down the rule above quoted.

Its misuse is manifest. In *Boyer v. United States*, (CA D.C., 1942) 132 F. 2d 12, 13,⁵³ Judge Edgerton stated some of these dangers:

“No doubt the alleged fact that a man committed a crime on another occasion tends to show a disposition to commit similar crimes. But when the prior crime has no other relevance than that, it is inadmissible. *Its tendency to create hostility, surprise, and confusion of issues is thought to outweigh its probative value.*” (Emphasis ours.)

Similarly, see *Boyd v. United States*,⁵⁴ (1892) 142 U.S. 450, 458; *Lovely v. United States*,⁵⁵ (CA 4, 1948) 169 F. 2d 386, 389, cert. den. 338 U.S. 834; *Sang Soon Sur v. United States*, (CA 9, 1925) 8 F. 2d 118, 119; *Smith v. United States*, (CA 9, 1926) 10 F. 2d 787; 2 *Wigmore on Evidence* (3rd Ed., 1940) § 305; Stone, “The Rule of Exclusion of Similar Fact Evidence: America,” 51 *Harv. L. Rev.* 988, 1007. Is this a case in which the probative value of the admitted evidence outweighed its prejudicial effect? Manifestly no. The evidence concerned deficiencies in the Doctor’s income tax for 1938-1941, seven to ten years prior to the date of the act for which he was being tried, March 15,

⁵³Cited by this Court with approval in *Wolcher v. United States*, 200 F. 2d at 498.

⁵⁴“Proof of them (the prior crimes) only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community * * *.”

⁵⁵“If such evidence were allowed, not only would the time of the courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defences on the issues really on trial.”

1948.⁵⁶ What bearing, then, could these acts have on the Doctor's intent and state of mind in March, 1948? To be admissible as evidence, these prior acts must be "so connected in point of time and of circumstance as to throw light upon the intent." *Boyer v. United States*, supra, 200 F. 2d at 13. In the *Boyer* case, the trial court was reversed for entertaining evidence offered by the prosecution of a prior fraud perpetrated by the defendant just two years previously. Although the trial court had finally ordered this evidence stricken, it was reversed by the Court of Appeals *on this ground alone*. The fact that the jury had had knowledge of the evidence sufficiently prejudiced them to entitle the defendant to a new trial. Because of the almost certain prejudicial effect of evidence of prior criminal acts, its use by the prosecution must be circumscribed to the strictest requirements of relevancy. *Wolcher v. United States*, supra.⁵⁷ Where these bounds are overstepped, as in the present case, the conviction must be set aside. *Boyer v. United States*, supra; *Wolcher v. United States*, supra.

⁵⁶Furthermore, these years, 1938-1941, were from twelve to fifteen years prior to the year, 1953, in which the prosecutor and the court insisted they be tried.

⁵⁷A decision of this Court reversing a conviction for income tax fraud on the ground, *inter alia*, that the trial court had erred in receiving evidence that the defendant's partnership tax return was fraudulent. The defendant was being tried on his individual income tax return filed for the same year.

IX. THE COURT ERRED IN EXCLUDING DEFENDANTS' OFFER TO SHOW THEIR INNOCENCE ON A THEORY SELECTED BY THE PROSECUTION TO SHOW THEIR GUILT.

In its opening statement and with frequency thereafter, the prosecution referred to certain damaging circumstantial evidence concerning the defendants' bank deposits of cash. (R. 74-75, 119-120, 124-125, 1926-1927, U.S. Exhibit 33.) Briefly, this evidence can be summarized as follows: In 1946, the defendants received in cash some \$50,000; in 1948, "there was roughly around \$50,000" received in currency. "But in 1947, which is the year with which we are concerned here, instead of some \$50,000 in currency coming into the office, being reported on the office books and being deposited in the bank account, there was only some \$25,000." (R. 74-75.) This discrepancy in the defendants' report of their cash receipts assumed additional importance in the jury's eyes when it was pointed out to them that this was the factor which initiated the thorough audit of investigation of the defendants. (R. 75, 131.)

In order to rebut the inference which seemed logically to flow from these facts, namely, that the defendants had concealed their cash receipts for 1947 by about \$26,000, defendants sought to introduce into evidence a record of their cash receipts for the years 1949 and 1950. The evidence was offered for the purpose of negating the circumstantial pattern created by the prosecution's earlier use of the years 1946 and 1948; despite its relevancy, the court excluded the evidence (R. 1144-1146, 1149-1151, 1156-1160, 1319).

In so ruling, the court committed reversible error. The prosecution, by its sponsorship of the record of cash deposits in 1946 and in 1948 had "opened up" the question. By introducing this circumstantial evidence, the prosecution asked the jury to infer guilt for 1947. How then can the prosecution and the court below deny to defendants the right to explore and to vitiate, if possible, the chain of circumstances developed by the prosecution? If the government insists cash deposits in 1946 and 1948 are relevant to 1947, the defendants have an unquestionable right to show cash deposits in 1949 and in 1950. Once having offered its chain of inferences to the jury, the prosecution must be held to permit the defence to negative any part of it: its major premise, its minor premise and its conclusion. To state this problem formally, we have the following syllogism:

Major Premise: The defendants' yearly cash receipts, if fully reported, total 50 per cent of their check receipts.⁵⁸

Minor Premise: In 1947, the defendants' cash receipts were but 25 per cent of their check receipts.

Conclusion: Therefore, the defendants concealed more than one-half of their cash receipts for 1947.

By its ruling, the court prohibited the defendants from rebutting the prosecution's major premise by showing that it was not true for 1949 or 1950. The government had selected only two years for its demonstration to the jury.

⁵⁸On U.S. Exhibit 33, this syllogism was simplified for the jury by the prosecution to: "If fully reported, the defendants' yearly cash receipts total \$50,000. In 1947, the defendants only reported \$24,000 in cash receipts. Ergo, the defendants concealed \$26,000." The size, coloring and simplicity of this exhibit indicate that the jury could not have failed to grasp the prosecution's conclusion.

The third year, 1947, showed either that its major premise was wrong or that, granting the major premise, income for 1947 had been understated. Shaky as the prosecution's major premise was, reflecting only a two to one ratio in experience, that premise would have been demolished by the addition of two other years consistent with 1947,⁵⁹ rather than with 1946 and 1948. Then an empirical testing of the situation would have shown a three to two probability that the defendants were innocent. In short, with the fall of its major premise, the government's conclusion, which bore on the defendants' guilt or innocence, would also fall.

Clearly, then, the evidence offered by the defence was relevant; it affected the validity of the prosecution's "starting point" in its chain of inferences; consequently, the court below should have admitted it. *Johnson v. United States*, (1943) 318 U.S. 189, 195-196;⁶⁰ *Gendleman v. United States*, (CA 9, 1951) 191 F. 2d 993, 996-997, cert. den. 342 U.S. 909;⁶¹ *Emich v. United States*, (CA 6, 1924) 298 F. 5, 9, cert. den. 266 U.S. 608;⁶² 1 *Wigmore on Evidence* (3rd Ed., 1940), §§ 34, 35.

⁵⁹The defence's proffer made in the absence of the jury indicates that they were: in 1947, cash received was 24 per cent of total receipts; in 1949, 25 per cent; and in 1950, 26.1 per cent (R. 1158-1159).

⁶⁰The Supreme Court permitted the prosecution, in an income tax fraud case, to develop the defendant's income for 1938, although he was indicted for 1935-1937.

⁶¹A net worth case, built upon circumstantial evidence, in which this Court noted that the defendant "was entitled to attack these conclusions (as to the increase in net worth) on cross-examination or with other evidence, or with his own computations * * *."

⁶²A case in which the trial court's action in receiving evidence of a return for 1920, filed in 1922, was approved, although the year of evasion was 1921.

To refuse defendants an opportunity to rebut the evidence was reversible error. Thus, in *Singer v. United States*, (CA 3, 1932) 58 F. 2d 74, 77, the trial court was reversed for a one-way ruling on certain circumstantial evidence favorable to the government. Its witness, to support its charge of income tax fraud, testified that the defendant's gross bank deposits totalled \$403,838.90 for the year. In order to negate the government's inference that these deposits constituted income, the defendant offered to show that he had deposited several accommodation checks in his accounts, which did not represent income to him. This evidence was excluded, a ruling for which the trial court was reversed.

Similarly in *Erhardt v. United States*, (CA 7, 1920) 268 F. 326, among its other errors, the trial court was reversed for refusing to allow the defendant to rebut the government on a circumstantial point. In prosecuting the defendant for espionage, the government introduced evidence that the defendant had proudly displayed in his kitchen a picture of the Kaiser. The defendant offered to show the circumstances under which he got, retained and displayed this picture, but his offer was excluded. In reversing, the Circuit Court of Appeals noted that assuming the picture testified to was admissible to prove the charge against the defendant, it was then error to exclude the defendant's evidence which bore directly upon the "matters then under inquiry."

And in *Chitwood v. United States*, (CA 8, 1907) 153 F. 551, 552, the same rule was expressed as to circumstantial evidence offered by the defendant who "had an undoubted

right to buttress his own testimony by any and all circumstances and facts fairly tending to support it." Solely for denying him this right, the trial court was reversed.⁶³

Consequently, the judgments of conviction entered below should be reversed because of the erroneous refusal of the court to receive defendants' evidence offered by them to show their innocence and to rebut the government's evidence of their guilt.

CONCLUSION.

The judgments of conviction entered below should be reversed.

Dated, San Francisco, California,
December 21, 1953.

Respectfully submitted,

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⁶³And see *Twatchan v. Connelly*, (CA 6, 1939) 106 F. 2d 501, 506, a civil case in which the court expressed the rule that the opposing party has a right to rebut even corollary facts introduced by the other "if otherwise he would be prejudiced."

(Appendix Follows.)



Appendix.



Appendix

Internal Revenue Code, Section 145.

(a) *Failure to file returns, submit information, or pay estimated tax or tax.*—Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

Examination of Juror Abram H. Hershler.

The examination by the court and answers by the prospective juror included the following (R. 58):

“Q. Do you feel that if you were selected to serve here you could do so, independently exercising your own good judgment and consult with your fellow jurors when the time comes for your deliberations and arrive at a verdict that in your judgment would be a proper one to all sides?

“A. I think so. There is one qualification. I read the reports of the first trial in the newspapers. I read them practically every day. So I am a little more familiar with this case than—

“Q. Pardon me. Did the reading of those newspaper accounts cause you to form an opinion as to the guilt or innocence of these defendants?

“A. Well, I suppose I had an opinion as I read them, yes.

“Q. Well, is that opinion one which you entertain now? I mean, do you have a present opinion as to the guilt or innocence of these people?

“A. Well, I would say presently I don't have any opinion. I don't suppose. I don't know unconsciously whether I may have or not. I don't know.

“Q. But, in other words, you are going to listen to the evidence, if you are selected here, and make up your mind when all the evidence is in and you have heard the arguments of counsel and the instructions of the Court; is that correct?

“A. Correct.

“The Court: All right.”

Defence counsel then stated that he would like to ask the juror “if he would be willing to have him try his own case if he were in Dr. Mitchell's position” (R. 59). The following then occurred (R. 59):

“The Court: Yes, I will ask that question.

“Q. If you, Mr. Hershler, found yourself in the unfortunate position now occupied by Dr. Mitchell and his wife, would you be willing to have your case determined and passed upon by a jury composed of 12 people whose frame of mind is the same as that of yours at the present time?

“A. Do you say ‘willing’ or ‘prefer’? Would there be any difference in your question?

“Q. No, I don’t think so. The choice of words is not important. Would you be willing—I will put it in that way—to have your case tried by 12 people in your frame of mind?

“A. I would be willing, but I wouldn’t prefer it.

“Mr. Dana: Would the Court ask if he would prefer not to have?

“The Court: Would you prefer not to?

“A. I would prefer not to. I would prefer to have it tried by the judge.

“The Court: All right.”

Defendant’s objections to:

Instruction No. 16.

This quotation is confusing and is a distortion of a quotation in the Paschen case (which had previously been cited).

The net effect of this instruction is that a man must look and if he negligently fails to discover—he is conclusively presumed to have the knowledge, since the duty to look exists.

The Paschen case distinctly states that no knowledge or intent is presumed or imputed. The court said (page 499):

“We do not by this recognize imputed or presumed knowledge or intent. We merely hold that a jury was entitled to infer knowledge on the part of the defendants.”

Instruction No. 27.

This instruction is a quotation from the Paschen case which quotation was in turn taken from the Cooper case (9 F. 2d 216). It omits the clarification noted in Instruction No. 16 above. In the same paragraph from which this quotation was taken, the court felt it essential that a statement be made that no knowledge or intent is imputed or presumed.

The net effect of the instruction as given here is that the defendant had a duty to keep books, he is conclusively presumed to have knowledge of the contents of those books—regardless of the true state of affairs.

There should be inserted in this instruction, as well as in instructions No. 16 and No. 50, the following language:

“This does not mean that knowledge concerning errors in the books or knowledge of errors, if any, in the tax returns, is presumed or imputed to the defendants; nor does it mean that any intent or wilfulness is imputed or presumed to the defendants.”
 Paschen v. U.S., 70 F. 2d 491, 499; Cooper v. U.S., 9 F. 2d 216, 222.

On motion for new trial:

“Mr. Dana: * * *

“If the Court please, that being the case, I can't see how we can invite the speculation of the jury to that effect. It seems to me like when that instruction is given, together with the instruction in which it is outlined that they may consider the case of the other reports for the

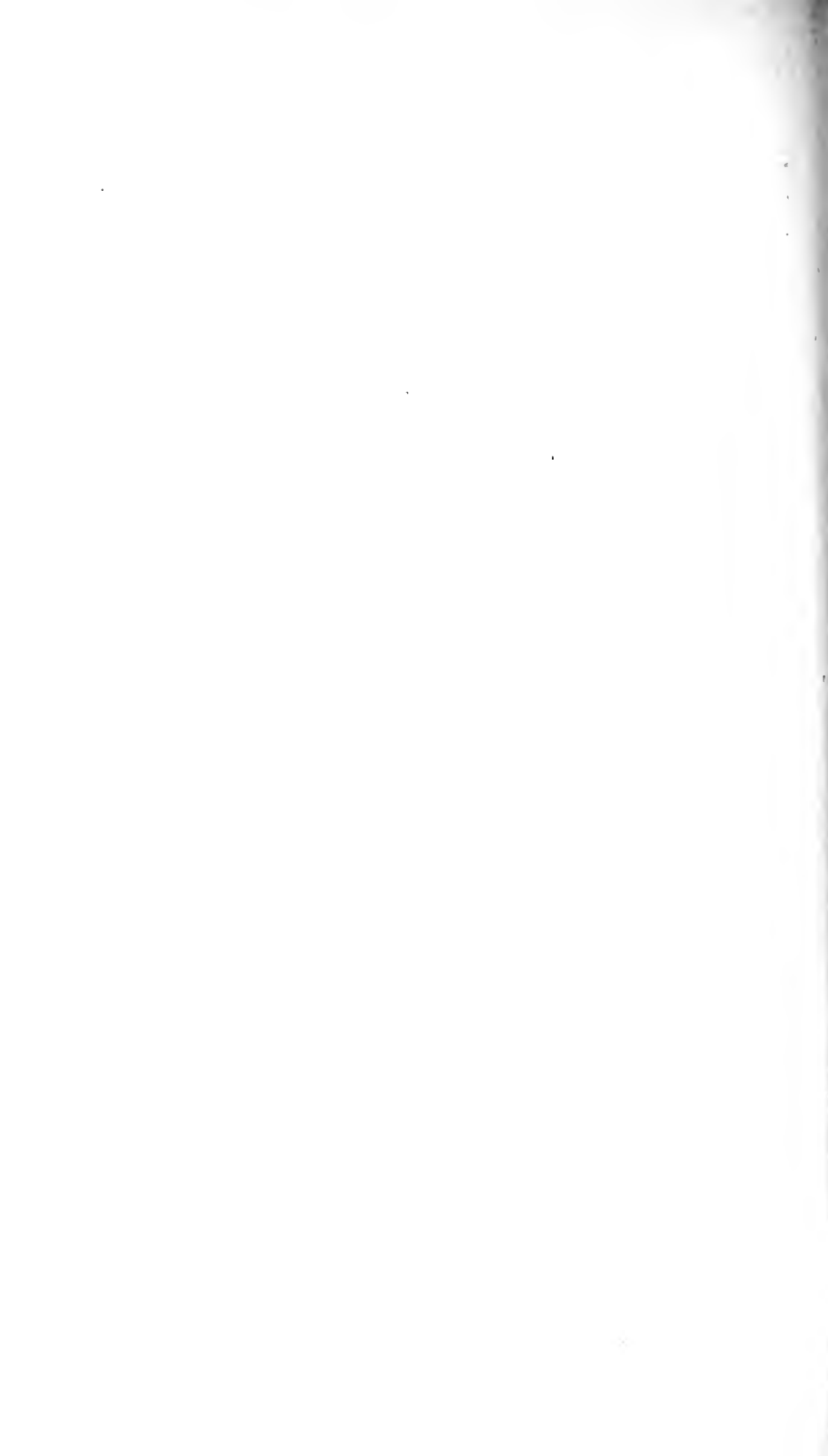
purpose of determining a frame of mind or design, that the defendant, by the combination of those instructions, it (is) put in the position where he is literally tried again for the same offenses.” (R. 1979.)

Federal Rules of Criminal Procedure

Rule 16. Discovery and Inspection

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17(c). For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.



No. 13,884
IN THE
United States Court of Appeals
For the Ninth Circuit

VAUGHN H. MITCHELL and DOROTHY MITCHELL, VS. UNITED STATES OF AMERICA,	}	<i>Appellants,</i> <i>Appellee.</i>
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BRIEF FOR APPELLEE.

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No. 13,884

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Appellants, husband and wife, were convicted on five counts relating to income tax evasion for the year 1947, whereby in round figures \$26,000 of taxable income was concealed and \$18,000 of tax was evaded. The first four counts charged income tax evasion against husband and wife for their own and their spouse's returns. The fifth count charged a conspiracy among husband and wife and Dr. Mitchell's office bookkeeper, Iris M. Cowart, a coconspirator but not a defendant, to evade the Mitchells' income taxes for the year 1947. The trial lasted one month. The printed record (without exhibits) is over 2000 pages.

I.

STATEMENT OF FACTS.

A. Standard to be used.

On appeal this Court must consider the evidence in the light most favorable to the government. *Schino and Hartmann v. United States*, F. (2d) (9th Cir. #13,375, 1953); *Glasser v. United States*, 315 U. S. 60, 80.

The record discloses a fully-perfected, elaborate scheme of tax fraud for the year 1947 deliberately undertaken by the Mitchells.

B. The tax evasion scheme.

The scheme involved the secreting of currency from the cash receipts of Dr. Mitchell's medical practice during the year 1947. This was accomplished by the use of two sets of cash receipt books in Dr. Mitchell's office and the switching of the cash receipt books daily (271, 419-420). The currency recorded in the open set of cash receipt books (ex. 11, ex. 12, ex. 53) was deposited in the bank in accordance with Dr. Mitchell's standard practice prior to 1947 (257-258, 272) and reported on the income tax returns (ex. 1, ex. 2, ex. 10, 125-131). The currency recorded in the hidden set of cash receipt books was kept in sealed envelopes in the office safe and secretly removed from the office from time to time by Mrs. Mitchell (272). Mrs. Cowart handled the daily switching of the cash receipt books (421), segregated the currency and the cash, and balanced each set of books daily (271), deposited the cur-

rency from the open set of cash receipt books in the bank (272), and delivered the other currency to Mrs. Mitchell (272).

The use of two sets of cash receipt books and the daily switching of the books was kept secret from all other employees in the office (423). None of them was told about the two sets of books except one employee, Mrs. Jean Peirson, who discovered it by accident (418, 284) and was then advised not to tell any other employee (423).

Sometime in January, 1948, the hidden set of cash receipt books was removed from the doctor's office and delivered to the Mitchells' apartment by Mrs. Cowart (279-281). This set of books was subsequently burned by Mrs. Mitchell in February, 1949, when she first heard of her husband's indictment for income tax evasion during the years 1942 to 1946 (1472, 523).

In August, 1949, the government discovered the use of the hidden set of cash receipt books during 1947 (131, 524). Internal Revenue agents then undertook to reconstruct Dr. Mitchell's true professional income (524); after approximately four months' work they prepared a tabulation of some 2,000 separate payments from some 1,000 different patients, totaling in excess of \$26,000 of cash income which had been concealed by the Mitchells (534-538). This tabulation of 44 pages appears in evidence as Exhibit 28. Throughout the trial not a single item in it was shown to be erroneous.

Appellants admitted the use of two sets of cash receipt books (1518, 1464), admitted the daily switching of books (1464), admitted the secrecy of the operation (1467), admitted the removal of currency in sealed envelopes from the office (1468, 1479), admitted the failure to deposit it in the bank (1507, 1522, 1523), admitted the removal of the hidden set of cash receipt books from the office (1523, 1472), admitted the failure to report income shown in these cash receipt books on their tax returns (ex. 32), and admitted the burning of the cash receipt books by Mrs. Mitchell (1529-1530, 1472).

The defense of Dr. Mitchell was that he knew nothing about the scheme, that it was one devised by his wife to obtain money from him without his knowledge in view of pending matrimonial troubles (1604-1607, 1633-1635).

Mrs. Mitchell admitted knowing all about the scheme, but her defense was that the tax evasion motive played no part in her conduct (1465, 1505) and, in any event, she thought this money would be reported on the income tax returns (1515-1516).

At the trial the testimony of Mrs. Cowart established Dr. Mitchell's participation in every important phase of the scheme—its initiation (266-270), suspension during Mrs. Cowart's vacation (820-821), termination at the end of the year (278-279), and delivery of the hidden set of cash receipt books to Mrs. Mitchell (280, 847).

The testimony of the office receptionist, Mrs. Peirson, provided direct proof that the scheme had been devised to evade income taxes. She had been told by Mrs. Cowart in 1947 that the scheme was Dr. Mitchell's idea (420), that the purpose of the scheme was to keep money out of the bank so that Internal Revenue agents could not trace it for income tax purposes (419-420, 460), that Dr. Mitchell had devised this scheme in order to outsmart the Government (420, 460), that Dr. Mitchell wanted to put so much money in the bank and withhold so much for himself (420, 467-468).

At the trial the defense undertook to show that Dr. Mitchell had filed amended returns for 1942 to 1946, had overpaid his taxes for those years (see ex. B), and that accordingly he had on deposit with the Bureau of Internal Revenue more than sufficient moneys to pay his admitted 1947 income tax deficiencies (249-252, 314, 1309). The evidence showed that in years prior to 1947, that is to say 1938 to 1946, Dr. Mitchell either filed no tax return or reported only a small fraction of his true income (262-264, 386-390), but that in these prior years he did not keep two sets of cash receipt books nor did he undertake to conceal his gross receipts by failing to deposit them in his various bank accounts (257-258). In July, 1949, Dr. Mitchell had been tried and acquitted for income tax evasion for the years 1942 to 1946 (147).

Dr. Mitchell's tax practices first came to light on November 5, 1946, when Internal Revenue Agent

Green in the course of a routine audit examined Dr. Mitchell's records and discovered a large deficiency in reported income for the years 1942 to 1945 (259-260). Agent Green talked to Dr. Mitchell that same day and informed him that by totalling his bank deposits he had been able to discover this large amount of unreported income (261). Agent Green additionally told Dr. Mitchell that if all his receipts were deposited in the bank and all his expenses paid by check, his true income could be readily calculated (261-262). Within 30 to 60 days of this conversation the present scheme, designed to prevent part of the currency receipts from ever passing through the bank accounts, was put into operation and continued throughout 1947 (ex. 6, 124).

The evidence, construed most favorably to the verdict of the jury—as is required in this review—clearly discloses that the 1947 scheme was put into operation for the specific purpose of outsmarting the Government and forestalling future analyses similar to that made by Agent Green during 1946 (420, 817-818).

At the end of 1947 appellants employed a certified public accountant, Joseph Lukes, to prepare their income tax returns for 1947 (1062). Mr. Lukes was not told about the two sets of cash receipt books (1171), was not told about the daily switching of cash receipt books, and was not told about the secret removal of currency from the office (1249). On the contrary Mr. Lukes was told that all currency was deposited in the

bank (1245). Accordingly, Mr. Lukes did not discover the fraud (1249) and prepared income tax returns for the Mitchells which failed to report any of the currency which had been secretly removed from the office (1251).

While the fact of secret removal of currency from the office was admitted by appellants, the amount was disputed. The Mitchells claimed it was \$8,770, and produced that amount of currency in court (ex. 32). Mrs. Cowart said it was \$15,000 (274). Appellants' expert accountant, Otto Sonnenberg, of Forbes and Company, gave his first reconstruction of unreported income at \$26,000 (1369, 1356) and his later best estimate at \$18,000 (1435). The reconstruction prepared by government agents of specific items of unreported income by date, name of patient, and amount of payment showed a total of \$26,242.75 and remained uncontroverted (ex. 28). Each of these figures is, of course, a substantial amount.

C. Issues in this cause.

A reading of the record indicates that the cause was primarily one of credibility of witnesses. The jury chose to believe Mrs. Cowart and Mrs. Peirson and to disbelieve appellants. Evidence of guilt was strong. In view of the proof of a deliberate, calculated scheme of tax evasion, the sufficiency of the evidence in support of the verdict is not attacked. Instead appellants seek reversal on the instructions given and on various evidentiary and procedural grounds.

II.

**THE COURT PROPERLY INSTRUCTED THE JURY AS TO
THE ISSUES IN THE CAUSE.****A. Duty to consider instructions as a whole.**

In considering instructions given a jury, this court must examine the instructions primarily to see if the jury properly understood the issues before it. Phrases in a charge cannot be picked out like raisins from a cake and examined by themselves apart from the remainder of the charge and apart from the real issues before the jury. The instructions must be read as a whole and in the light of the case as a whole. *Boyd v. United States*, 271 U.S. 104.

Was there or was there not a tax evasion scheme to defraud the government? That was the great issue here. The instructions clearly and comprehensively pointed this out to the jury.

B. A reading of the instructions leaves no doubt that appellants were on trial for criminal acts and not for negligence.

The instructions given were standard instructions similar to those approved by this Court on several occasions, *Remmer v. United States*, 205 F. (2d) 277, 290; *Barcott v. United States*, 169 F. (2d) 929, 932. Nevertheless appellants contend that the jury was left with the impression that appellants, merely if negligent in handling their financial affairs, could be found guilty of the crime of tax evasion. Appellants argue the impact of the instructions was to advise the jury that these appellants could be convicted of tax evasion by reason of negligence alone.

This issue can only be resolved by reading the instructions. Such a reading shows that again and again the court charged the jury that the issue before it was whether or not there had been a wilful attempt to evade taxes. The government was required to prove that appellants “*wilfully attempted to evade and defeat*” their taxes (1939). Attempt contemplates “*knowledge and understanding*” (1940), “*purposely failing to report all the income which they knew they had*”, “*which they knew it was their duty*” to report (1940). The court referred to “*schemes*”, “*subterfuges*”, “*devices*”, and “*wilful attempts*” to escape the tax (1940). “*The attempt must be wilful*” (1941), that is to say “*consciously*”, “*knowingly*”, “*intentionally*”, “*intentionally done*”, “*with the intent that the government should be defrauded*” (1941). The result must be that the government was “*cheated*” or “*defrauded*” (1941). The court referred to intent as a state of mind (1941) and used the following language: “*intended to conceal*” (1942), “*not acting in good faith*” (1942), “*purpose of evading his tax liabilities*” (1942), “*the criminal state of mind*” (1942), “*tax evasion motive*” (1942), “*intent to defraud*” (1943). The court referred to “*knowledge of the falsity of these returns*” (1945), “*responsibility of at least good faith and ordinary diligence*” (1945), filing of a fraudulent return with wilful intent to defeat the tax (1946), “*criminal intent*” (1951), “*a partnership in criminal purposes*” (1949), “*intentional participation*” (1952).

The court quoted practically verbatim from the leading case of *Spies v. United States*, 317 U.S. 492, 499. This instruction was as follows:

“On the question of intent to evade, and, just by way of illustration and not by way of limitation, there are certain matters which you should consider pointing to intent so far as tax evasion is concerned, if you find that they existed in this case. These are general illustrations: *keeping a double set of books, making false entries in the books, altering invoices or destruction of books, destruction of records, concealment of assets, covering up sources of income, handling one’s affairs to avoid the making of the usual returns, and any conduct the likelihood of which would be to mislead or to conceal.* And if the *tax evasion motive* plays any part in such conduct, the offense may be made out, though the conduct I have mentioned might also serve some other purpose.” (1942-1943).

The Supreme Court in the *Spies* case had said:

“. . . By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even

though the conduct may also serve other purposes such as concealment of other crime." (499).

Over and over again the court charged the jury on the main question before it—was there a fraudulent tax scheme here? This was the great issue of fact for the jury to determine—both in the tax evasion counts and in the conspiracy count.

The government offered proof of the existence of a deliberate tax evasion scheme in which four of the five badges of fraud set forth by the Supreme Court in the *Spies* case were present, that is to say the keeping of two sets of books, the destruction of records, concealment of assets, and the handling of affairs to avoid making the usual record of bank deposits.

Appellants presented a sweeping defense that Dr. Mitchell knew nothing whatever about the scheme and that Mrs. Mitchell had no thought of tax evasion in mind.

Accordingly, the primary issue before the jury was clear cut. Had there been a deliberate tax evasion scheme and conspiracy as charged? If so, appellants were guilty. If not, they were innocent. This was no case of carelessness, failure to keep records, misinterpretation of the law, mistaken though honest beliefs as to non-taxability of income, underreporting due to ignorance of tax matters, or the like.

The defense of Dr. Mitchell denied all knowledge of the pertinent facts. The testimony of important witnesses identified him with each important phase of the tax evasion scheme. The issue was thus squarely

presented. If he were ignorant of what had happened in his office, then, of course, he had no connection with a tax fraud scheme. If, however, he had devised and initiated the secret removal and concealment of currency from his office in order to outsmart the government and to forestall government methods of reconstructing income recently brought to his attention, then he was guilty. No middle ground of negligence or of misunderstanding of law or misapplication of law was present. The instructions of the court made it perfectly clear that the jury must find the requisite criminal intent, or the criminal state of mind, as the court said (1942).

The same applies to Mrs. Mitchell. Either the jury believed her story that she was acting in good faith with no thought of tax evasion in mind but solely motivated by reason of matrimonial difficulties, past, present and prospective, or it rejected her story and found her an active partner in a tax evasion enterprise. The facts relating to Mrs. Mitchell were essentially not in dispute. Significant on the aspect of intent is the fact that Mrs. Mitchell burned the hidden set of cash receipt books on first hearing of Dr. Mitchell's indictment for income tax evasion in other years.

The court's instructions made it plain that tax evasion required specific criminal intent, wilfulness, a criminal state of mind, failure to act in good faith, intent to conceal, purposefulness, wilful attempts to evade. The issue of appellants' guilt or innocence was made clear to the jury. The jury chose to be-

lieve Mrs. Cowart and Mrs. Peirson as to the intent with which these various acts were done and to disbelieve Dr. Mitchell and Mrs. Mitchell. The jury returned its verdict accordingly.

In a tax evasion case the standard of wilful attempt has been laid down with precision in *Spies v. United States*, 317 U.S. 492, 499. This court, in *Barcott v. United States*, 169 F. (2d) 929, 932, and in *Remmer v. United States*, 205 F. (2d) 277, 290, has approved instructions substantially similar to those in the present case. See also *Sullivan v. United States*, 75 F. (2d) 622, 623.

The specific phraseology objected to in the instructions was taken from *United States v. Banks* (U.S. D.C. Minn. 1952), #72,355 P-H Fed. 1953. The instructions there given were sustained on appeal by the 8th Circuit, 204 F. (2d) 666, 672, and certiorari was denied by the Supreme Court, 74 S. Ct. 73, 98 Law Ed. Adv. 58.

- C. The court properly charged the jury that taxpayers are required to keep books and records sufficient to establish their income.**

Appellants except to the following instruction:

“Every person under the laws of the United States, except wage earners and farmers, liable to pay income tax, is required to keep such permanent books of account and records as are sufficient to establish the amount of his gross income, and the deductions, credits and other matters required to be shown in any income tax return.” (1952).

It is claimed that this instruction, although given in the language of the statute and the Bureau's regulations (I.R.C. 54 (a), Regulations 111, Sec. 29.54-1), might suggest to the jury that appellants were on trial for failure to keep suitable books and records, rather than for evading income taxes through the device of a fraudulent scheme.

The instruction given was relevant, because the keeping or not keeping of suitable records was of direct concern to the jury on the question of wilful attempt to evade. Admittedly records had been destroyed. Failure to keep the usual records may be a basis of an inference of affirmative wilful attempt to evade. *Spies v. United States*, 317 U.S. 492, 499; *Remmer v. United States*, 205 F. (2d) 277, 288 (failure to keep adequate books may be a basis for an inference of wilful intent to evade); *Himmelfarb v. United States*, 175 F. (2d) 924, 943, 947.

Accordingly, the instruction was proper.

D. Attack on instructions not excepted to at the time of the charge.

Appellants attack portions of the instructions not objected to at the time of the charge, and likewise claim omissions from the charge, also not brought to the attention of the court at the time of charging.

Rule 30 of Criminal Procedure reads in part:

“ . . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict . . . ”

Instructions excepted to or proposed for the first time on a motion for a new trial need not be considered by this court. *Ziegler v. United States*, 174 F. (2d) 439, 448; *Boyd v. United States*, 271 U.S. 104, 108.

1. **Duty to file an income tax return is personal.**

An instruction now sought to be attacked reads as follows:

“The duty to file an income tax return is personal. It cannot be delegated to anyone. Bona fide mistakes should not be treated as false and fraudulent, of course. [2133] But no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else.” (1945).

It is claimed that this instruction suggested a rule of criminal guilt by respondeat superior. Sufficient answer is found in the instruction given by the court that guilt is personal:

“You are instructed that in a criminal case, such as this, a principal or employer is not criminally liable merely because his agent or employee may have engaged in conduct which the law denounces. In order to render a person criminally liable, it is essential that he had the requisite criminal intent at the time the supposed criminal act was [2139] committed. In other words, specific intent cannot be imputed to a principal or employer

through his agent or employee, without proof of the principal's or employer's direct participation in, or authorization of, the criminal act." (1950-1951).

2. The result of any previous trial not to be considered by the jury at this trial.

Another instruction now excepted to by appellants reads:

"You are instructed that the guilt or innocence of Dr. Vaughn H. Mitchell on charges of tax evasion for the years 1942 to 1946, inclusive, is not to be considered by you in determining his guilt or innocence on the charges which are now before you, nor are you to consider for any purpose whatsoever the result of any previous trial." (1938-1939).

Since no objection was made at the proper time, under Rule 30 this portion of the charge is likewise not a ground for error, nor is failure to give some other charge which appellants might now advance.

It is now suggested that through this instruction Dr. Mitchell was being retried for the years 1942 to 1946, and extensive reference is made to the closing arguments in the case (likewise not excepted to by appellants at the time of trial). We have here an afterthought similar to that of the Monday morning quarterback mentioned by this court in *Schino & Hartmann v. United States*, F. (2d) (9th Cir. #13,375, 1953). A reading of the record discloses that the jury could have had no doubt whatever as to the fact of Dr. Mitchell's previous acquittal.

Note that the court told the jury to disregard any previous trial in reaching a verdict on the charges now before it. It was thoroughly proper for the court to do so. Test the instruction by putting the shoe on the other foot. Suppose a previous conviction. The instruction is equally valid—this jury was not concerned with the subject.

The *results* of previous trials must be contrasted with *facts* and conduct in previous years. Previous facts can never be disregarded, if relevant. The fact of previous tax understatement, if relevant to any issue in this case, is admissible evidence, as will be more fully discussed later in this brief.

III.

NEWSPAPER READING AND SLIGHT OPINIONS THEREFROM DO NOT DISQUALIFY A JUROR.

Appellants seek reversal of the verdict because of refusal of the court to sustain a challenge for cause directed to juror Hershler.

Mr. Hershler was a corporation executive; he did not know the parties; he had no prejudices; he had read newspaper reports of the case and may have formed some slight opinion from reading; he would listen to the evidence and the instructions of the court and make up his mind when all the evidence was in; he would be willing to be tried by a jury in his frame of mind, but would prefer trial by the court. No challenge for cause was made against him until the

defense discovered it had exhausted its peremptory challenges.

A subsequent challenge for cause was denied by the court. However, the court instructed the jury to disregard any newspaper reports or prior impressions and to try the case wholly upon the evidence received in the courtroom (63-64). And in final instructions the court instructed the jury several times to reach a verdict solely on the evidence admitted in court (1934-1935, 1948, 1956, 1959). The examination of Mr. Hershler, the court's ruling, and the court's admonition to the jury are reprinted herein as an Appendix.

We have this situation. A highly intelligent juror had read newspaper accounts connected with the case; had formed some slight opinion as to the result of them; was fully capable of listening to the evidence and following instructions of the court; would be willing to have his case tried by a jury in his frame of mind, but would prefer trial by the court.

Does this disqualify him on the ground of bias?

Appellants argue they are entitled to a jury free from any impressions whatsoever and that it was prejudicial error to refuse the challenge.

Such a contention is at variance with the law of the past 150 years. The law does not disqualify jurors who have impressions or opinions about a case. Disqualification only results when those opinions are fixed or are of such strength as to render difficult

the weighing of evidence produced in court, or following in good faith instructions of the court.

A moment's reflection will indicate why this is so. In our society criminal matters of more than routine interest are highly publicized in the press, which is read daily by the populace from which jurors are selected. Practically every prospective juror in a case of any consequence has read about the case to a greater or less extent. The purpose of reading is to educate and inform, and each juror who has read anything necessarily has formed some opinion, no matter how slight, as to matters about which he has read. The same, of course, is true of the judges of the trial courts and the reviewing courts. The results of such reading must produce some reaction—which can be called an impression, opinion, hypothesis, feeling. It is generalized second-hand knowledge of the facts of the case.

Every honest literate juror in cases of general public interest is bound to acquire these impressions or opinions. These do not disqualify. To so hold would be to remove the most intelligent and enlightened citizens from jury service in all publicized cases. It is only fixed opinions which disqualify.

These principles have been well understood from the earliest days of the Republic. *United States v. Burr*, Fed. Cas. 14692 (g). *Reynolds v. United States*, 98 U.S. 145. In the *Reynolds* case, members of the jury panel had read newspaper reports of the trial, had formed some opinions not based on evidence, but said

that such opinions would not influence their verdict. The court held them to be competent jurors:

“All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive (*Gabbet*, *Criminal Law*, 391); others, that it must be decided and substantial (*Armistead’s Case*, 11 *Leigh* (Va.), 659; *Wormley’s Case*, 10 *Gratt.* (Va.) 658; *Neely v. The People*, 13 *Ill.* 685); others, fixed (*State v. Benton*, 2 *Dev. & B.* (N.C.) L. 196); and, still others, deliberate and settled (*Staup v. Commonwealth*, 74 *Pa. St.* 458; *Curley v. Commonwealth*, 84 *id.* 151). All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in *Burr’s Trial* (1 *Burr’s Trial*, 416), states the rule to be that ‘light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.’ The theory of the

law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." (155, 156)

Note the language of a disqualifying opinion: positive, decided, substantial, fixed, deliberate, settled, strong or deep impressions which close the mind against opposite testimony. The Supreme Court further noted that in matters of jury qualifications the trial court should not be reversed except in a clear case, because the trial court has the opportunity to observe the reaction of the juror and his honesty in articulating his sentiments.

The Supreme Court has consistently followed the ruling of the *Reynolds* case. *Hopt v. Utah*, 120 U.S. 430, 432, 434; *Thiede v. Utah Territory*, 159 U.S. 510, 516; *Spies v. Illinois*, 123 U.S. 131, 167-180; *Holt v. United States*, 218 U.S. 245, 248. In the *Holt* case the court held that impressions derived from newspaper reading do not disqualify a juror from serving, Mr. Justice Holmes stating:

“Next it is said that there was error in not sustaining a challenge for cause to a juryman; with the result that the prisoner’s peremptory challenges were diminished by one. On his examination it appeared that this juryman had not talked with anyone who purported to know about the case of his own knowledge, but that he had taken the newspaper statements for facts; that he had no opinion other than that derived from the papers, and that evidence would change it very easily, although it would take some evidence to remove it. He stated that if the evidence failed to prove the facts alleged in the newspapers he would decide according to the evidence or lack of evidence at the trial, and that he thought he could

try the case solely upon the evidence fairly and impartially. The finding of the trial court upon the strength of the jurymen's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which it is far from being in this case. See *Reynolds v. United States*, 98 U.S. 145. *Hopt v. Utah*, 120 U.S. 430. *Spies v. Illinois*, 123 U.S. 131 . . ."

See also *United States v. Dennis*, 183 F. (2d) 201, 228; affirmed 341 U.S. 494.

The rule then is that opinions founded on rumors or newspaper reports do not disqualify a juror if it appears to the court that the juror can, notwithstanding such an opinion, act impartially. This rule has been applied many times in this Circuit. *Green v. United States*, 19 F. (2d) 850, 855; affirmed 277 U.S. 438; *Dimmick v. United States*, 121 Fed. 638, 642; *Dolan v. United States*, 116 Fed. 578, 582; *Merritt v. United States*, 264 Fed. 870, 876. See also *California Penal Code* §1076. To be contrasted are cases where jurors have personal knowledge of the facts or have acquired fixed opinions and expressed doubt as to whether or not they could lay their opinions to one side. *Rosencranz v. United States*, 155 Fed. 38, 46.

The facts of this case as they relate to juror Hershler show an intelligent man of affairs honestly informing the court that he reads the papers; that he has formed some opinion as the result of such reading; that the opinion would not prevent him from passing

on the evidence and following the instructions of the court. Such a juror is fully qualified. If a defendant prefers other jurors he has his peremptory challenges, which by reason of the greater number given him gives him greater control than the government over the composition of the jury.

The test is not one of deriving opinions and impressions. It is one of fixed opinions which will resist change. None such were present in this case.

IV.

MRS. COWART WAS FULLY EXAMINED BY THE DEFENSE. THE COURT PROPERLY LIMITED THE USE OF LEADING QUESTIONS ADDRESSED TO THIS WITNESS.

Complaint is made that appellants were not permitted to cross-examine Mrs. Iris Cowart.

The record discloses that Mrs. Cowart was cross-examined by the defense at length for the better part of two days (287-298, 746-814, 823-868). A reading of her testimony indicates she was questioned exhaustively by the defense on all material and relevant matters.

What the court did was to limit appellants' use of leading questions addressed to this witness.

We are thus dealing solely with a matter of form.

Leading questions are, of course, questions put by the examiner which suggest the desired answers to the witness. The danger of their use is that words are

put into the mouth of the witness, and the testimony becomes that of the interrogator rather than that of the witness. Under such circumstances distortion may result. Fundamentally, the law is a search for the truth, and all legal principles flow from this source. Accordingly, whenever leading questions to a friendly witness are likely to distort the testimonial picture of the true facts, a court may limit or forbid their use. While leading questions are normally objectionable on direct examination and normally permissible on cross-examination, this rule is a rule of trial procedure and subject to change in the light of a witness's relationship and attitude to the cause and the parties.

No rigid rules can be formulated. As stated by Professor Wigmore, the matter must rest largely in the hands of the trial court. *Wigmore on Evidence*, §770. Whenever a witness is shown to be biased in favor of the cross-examiner, the court may exercise its discretion in refusing to permit leading questions to be put to this friendly witness. *Wigmore on Evidence*, §773, §915: “. . . when an opponent's witness proves to be in fact biased in favor of the cross-examiner, the danger of leading questions arises and they may be forbidden.” *Jones on Evidence*, §2336: “The trial court may, however, restrict the use of leading questions where the witness shows bias in favor of the cross-examiner.” *Underhill's Criminal Evidence*, §389, pages 752-753, 757; *Best on Evidence*, §642, pages 593, 601; *American Law Institute, Model Code of Evi-*

dence, Edmund M. Morgan, Reporter, Rule 105(g), pages 108-110.

In this case the facts were ample to justify the prohibition against leading questions. Mrs. Cowart was a former employee of Dr. Mitchell (265). At Dr. Mitchell's request she had refused to give any statement to the government (425, 284, 764, 505). She had continued her refusal for a year until she had been advised her own prosecution was being considered (806-809). She had been unable to remember important parts of her testimony on direct examination without considerable refreshing (268, 274, 278, 280). Her husband had recently been operated on by Dr. Mitchell and had died between the first and second parts of her cross-examination (762, 827-828). The cross-examination of Mrs. Cowart discloses good reason for the limitation of leading questions. She gave an affirmative response to a question suggesting that she had delivered cash receipt books to Mrs. Mitchell at the end of February, whereas her true testimony placed the date at the end of January (770-771, 281), and gave an affirmative answer to a suggestion that she had been 15 months pregnant (798).

Objections to leading questions merely go to the form of the questioning. No injury can result in the quest for the truth. The question can always be re-framed and asked again in unobjectionable form, as happened here (797, 766, 785, 813).

As the courts have stated many times, control of cross-examination is within the sound discretion of the trial court. *Remmer v. United States*, 205 F. (2d) 277, 290; *Glasser v. United States*, 315 U.S. 60, 83; *Thiede v. Utah Territory*, 159 U.S. 510, 519. In *St. Clair v. United States*, 154 U.S. 134, 150, a case involving the converse of the situation here, that is to say, permissive use of leading questions on direct examination, the court said:

“ . . . This was allowed, and we cannot say that the court in so ruling committed error. In such matters much must be left to the sound discretion of the trial judge who sees the witness, and can, therefore, determine in the interest of truth and justice whether the circumstances justify leading questions to be propounded to a witness by the party producing him. In *Bastin v. Carew, Ryan & Mood*. 127, Lord Chief Justice Abbott well said that ‘in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice.’ . . . ” (150)

The record fully supports the appropriateness of limiting the use of leading questions by the defense in its interrogation of Mrs. Cowart.

V.

ADMISSIBILITY OF EVIDENCE.

We call attention to the rule most recently set forth in *Remmer v. United States*, 205 F. (2d) 277, 289. Evidentiary contentions "must be considered in conjunction with the salutary rule that the discretion of the trial court should not be disturbed in such matters unless the accused has been deprived of substantial rights." *Federal Rules of Criminal Procedure 52 (a)*. *United States v. Johnson*, 319 U.S. 503, 519-520.

In view of the overwhelming, clear and direct evidence of fraud in this case we urge that no evidentiary ruling, even if incorrect,—which we do not admit—could disturb the verdict.

- A. Evidence relating to appellants' tax affairs in other years is admissible when relevant to any issue. Such evidence is relevant here with respect to (1) origin of the scheme to outsmart the government, (2) extent of good faith in paying up back taxes, and (3) the defense of accidental happenstance.**

The principal evidentiary point relates to the admission in evidence of appellants' financial practices in other years.

Dr. Mitchell's previous acquittal on charges of tax evasion during 1942 to 1946 is, of course, conclusive on the issue of absence of a wilful attempt to evade taxes with respect to those years. However, the facts of his financial affairs in years previous to 1947 are directly pertinent to three issues in the instant case. Under the doctrine of multiple admissibility, admissi-

bility on any one ground makes such evidence relevant and admissible. *Wigmore on Evidence*, §215.

1. Insofar as the scheme for 1947 is concerned, the government charged, and there was abundant evidence to prove, that the scheme devised for use in 1947 was a direct outgrowth of the transparency of Dr. Mitchell's previous practices and had been designed to outsmart the government.

The evidence showed that on November 5, 1946, Agent Green notified Dr. Mitchell that by means of bank deposits he had discovered large discrepancies in Dr. Mitchell's tax returns for the years 1942 to 1945. Agent Green testified to his conversation with Dr. Mitchell in this connection as follows:

“A. I told the doctor that I had just finished adding up the bank deposits for the years 1942 through 1945 and had compared them with the gross receipts as reflected on his tax returns for those years and had found a large discrepancy.

Q. What did he say to that?

A. He asked me if I had any idea of what the figure was, and I told him I could only give him a very preliminary estimate and the figure I quoted to him was \$100,000.

Q. And how did you tell him you had arrived at that figure?

A. I told him I had arrived at it by totaling the bank deposits.

Q. What was said by Dr. Mitchell to that?

A. He asked—I don't remember whether it was just at that [227] very moment or a little

while later if he asked that—that he asked whether he should have an accountant.

Q. What did you say?

A. I told him that since the girls had mentioned and had told me that all money that was taken in by the profession was deposited and that all expenses of his practice were paid by check, that an accountant would not be necessary because they could get the figures right from the bank account and right from the checking account and that if there was any problem that they ran into I was available for him as we are in all cases.

Q. Did you say what figures could be used for gross income?

A. I told him that the bank deposits, since I had been informed all money was put in that account or accounts, would be the basis of his gross receipts." (260, 261, 262)

Within 30 to 60 days there began the use of two sets of cash receipt books and the secret removal of currency from the office. The government produced direct evidence that the purpose of this change was income tax evasion. Here is the testimony of Mrs. Peirson as to her conversation with Mrs. Cowart, office book-keeper and coconspirator:

"A. She said that up to now the Doctor had always put all, banked all his money in the bank, and that when the Internal Revenue Department went there to look it was always there, and that this year he had intended to outsmart the Government, that he put so much in the bank but he would withhold so much for himself, too.

Q. Did Mrs. Cowart say who had been switching these books?

A. Yes. She told me she had been switching the books on me when I went on my relief up to that time.

Q. Did she say how long she had been doing this?

A. She said since I had started working until that time.

Q. Did she say who had instructed her to do this? [408]

A. Well, she always had told me that it was Doctor's idea, she was just cooperating and carrying through the plan.

Q. Did she tell you the purpose of making this switch?

A. Well, yes. He was only going to show so much on one set of books and on the other set of books he was going to keep the amount from them for himself and that would determine the two different sums of money.

Q. Well, did she say whether or not this was for tax purposes?

A. Yes. She said that he was doing it so that he would only show so much on his income tax." (419, 420)

See also Mrs. Peirson's testimony at pages 460-461, 487-488.

Under these circumstances the facts relating to understatement from 1938 to 1946 became directly material on the question of appellants' knowledge of bookkeeping and financial matters and as bearing on the question of the intent, motive, and purpose with which the dual cash receipt book system was set up.

Such evidence is admissible if relevant to any issue in the case. *Wigmore on Evidence*, §301, §305. The criminality of other acts is immaterial. *Wigmore on Evidence*, §216. This evidence was introduced to show that appellants set up their books and affairs in order to evade taxes and with the knowledge and directly based on the experience growing out of Dr. Mitchell's previous tax investigation. *Johnson v. United States*, 318 U.S. 189, 195-196; *Michelson v. United States*, 335 U.S. 469, 475-476; *McCoy v. United States*, 169 F. (2d) 776, 783 (9 Cir.); *Weiss v. United States*, 122 F. (2d) 675, 681-685; *Bracey v. United States*, 142 F. (2d) 85, 87-88; *Emmich v. United States*, 298 Fed. 5, 9; *Malone v. United States*, 94 F. (2d) 281, 286-287; *Himmelfarb v. United States*, 175 F. (2d) 924.

2. Additionally, however, the defense itself interjected into the trial evidence relating to earlier years.

In the opening statement for the defense, the prior acquittal of Dr. Mitchell was stressed at length (81, 82, 84, 87, 101), and a theory was elaborated that Dr. Mitchell had not conspired to evade his taxes but that the government had conspired to "get" Dr. Mitchell (82, 106).

The defense's opening statement also stressed the deposit of \$185,000 by Dr. Mitchell (99, 102), and at the outset of the trial introduced Exhibit B, designed to show that Dr. Mitchell had overpaid his taxes for the years 1942 to 1946 when he had learned of deficiencies for those years, and that he still had a substantial overpayment of \$28,000 for the years 1942 to

1946 on deposit with the government which would more than cover any deficiencies proved for 1947. Exhibit B was introduced on cross-examination of the first important government witness (249, 250). This theory of overpayment by \$28,000 was developed through the testimony of Mr. Lukes, appellants' tax accountant (1307-1309). This same theory was a main argument of the defense in its closing address to the jury (1896-1897).

To rebut this evidence of good faith by payment, the government was entitled to show that Dr. Mitchell only filed amended returns for 1942 to 1946, years in which criminal prosecution was still possible and on which the criminal statute of limitations had not yet run; that while the tax investigation and Dr. Mitchell's power of attorney included the years 1938 to 1946 (ex. 61, 1668-1670), in each of which he had either filed no tax return or a return grossly understating his true income (386-389), that in years prior to 1942 he had filed no amended returns and paid nothing on his taxes (1202, 1671). This evidence then, and particularly that relating to 1938 to 1941, was introduced on issues raised by the defense, that is to say, good faith by full payment of all taxes owed upon discovery of inadequate bookkeeping.

3. Finally, the evidence was admissible on the issue of Dr. Mitchell's credibility as a witness. Dr. Mitchell's basic defense was that the tax returns for 1947 understated his true professional income as an unhappy result of a collocation of circumstances, a

series of misadventures and mishaps which made possible the systematic concealment and removal of currency from his office without any knowledge on his part of the entire affair until September, 1949. The main issue presented by Dr. Mitchell's defense and by his own testimony was Dr. Mitchell's complete ignorance and entire good faith on the one hand as opposed to his deliberate participation in a scheme to outsmart the government on the other. On this issue, that is to say, Dr. Mitchell's credibility as to whether or not he was the victim of circumstance, evidence relating to his financial practices in previous years was likewise admissible.

Such prior conduct, not amounting to wilful attempt to evade in prior years, is nevertheless admissible evidence bearing on the credibility of Dr. Mitchell's story and the possibility that he was a victim of accidental circumstances.

As stated by Professor Wigmore, if other acts are relevant, their criminality is immaterial. *Wigmore on Evidence*, §216. *McCoy v. United States*, 169 F. (2d) 776, 783 (9 Cir.); *Bracey v. United States*, 142 F. (2d) 85, 87-88. (D.C. 1944) (Previous sexual offenses against little girls); *Michelson v. United States*, 335 U.S. 469, 475-476; *Fall v. United States*, 49 F. (2d) 506; *Weiss v. United States*, 122 F. (2d) 675, 681-685; *Johnson v. United States*, 318 U.S. 189, 195-196. Dr. Mitchell's prior acquittal on a charge of wilful attempt to evade taxes for 1942 to 1946 does not make relevant evidence relating to

those years any the less admissible in this proceeding. *People v. Johnston*, 20 A.L.R. 2nd, 1001, annotation at 1035; 22 C.J.S., Criminal Law, §691; *Himmelfarb v. United States*, 175 F. (2d) 924, 941.

The same facts may be relevant to more than one legal proceeding. *United States v. Bayer*, 331, U.S. 532, (two prosecutions for different offenses even though arising out of the same facts); *Pinkerton v. United States*, 328 U.S. 640, (prosecution for conspiracy as well as the substantive offenses); *Coy v. United States*, 5 F. (2d) 309 (9 Cir.); *Feldman v. United States*, 322 U.S. 487, 490-493, (state and federal prosecutions); *Helvering v. Mitchell*, 303 U.S. 391, (government may proceed in civil fraud liability even though defendant acquitted of criminal fraud); *Fall v. United States*, 49 F. (2d) 506, 511, (after Fall and Doheney were acquitted of conspiracy, Fall was convicted of bribery).

The evidence then relating to 1938 to 1946 is admissible on three separate grounds of relevancy, any one of which is sufficient by itself.

B. Appellants were not entitled to inspect prior statements of government witnesses, because no contradiction with their current testimony was ever shown.

The court sustained the refusal of the government to produce prior statements of its witnesses who testified in court. These witnesses, Mrs. Cowart and Mrs. Peirson, were examined fully by the defense as to all relevant facts within their knowledge. The

government was not required to produce previous statements taken from them.

This ruling was correct. Such statements are not evidence, but are part of the work product of the lawyer. Consistently in federal evidence such statements of witnesses have not been required to be produced. *Hickman v. Taylor*, 329 U.S. 495, 512. This ruling is so clear that counsel familiar with it no longer subpoena narrative statements of witnesses. *Bowman Dairy v. United States*, 341 U.S. 214, 217, 219, 221.

Prior statements need not be produced because they are not evidence. There is, however, one situation in which said statements may become *evidence*, that is to say, when the prior statement is shown to be inconsistent in material respects with the testimony of the witness on the stand. After such a showing the statement becomes a prior inconsistent statement and becomes possible evidentiary matter for the purpose of impeaching the veracity of the witness. After the making of such a showing, then and only then, can a party demand statements in the possession of the government which are contradictory to the witness's present testimony. After such a showing, such statements have graduated from hearsay to evidence. This rule is most recently set forth in *Gordon v. United States*, 344 U.S. 414. There the witness's direct testimony implicated petitioner in the crime, but the witness admitted that on three or four earlier occasions he had made statements clearing petitioner. The

court held that after such a showing petitioner was entitled to demand the statements and use them to impeach the witness's credibility. Because the foundation had been laid, then and only then, did the prior statements graduate from hearsay to evidence and their production become required. As stated by the court:

“By proper cross-examination, defense counsel laid a foundation for his demand by showing that the documents were in existence, were in possession of the Government, were made by the Government's witness under examination, *were contradictory of his present testimony, and that the contradiction was as to relevant, important and material matters* which directly bore on the main issue being tried: the participation of the accused in the crime. The demand was for production of these specific documents and did not propose any broad or blind fishing expedition among documents possessed by the Government on the chance that something impeaching might turn up. . . .” (418)

“. . . Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. . . .” (421) (Italics ours)

The rule is clear. First, a showing of *contradictory* statements on material matters, then and only then, the production of matter which on the basis of that showing has become evidentiary.

In the absence of such a showing, production of the statements will not be required. *Goldman v. United States*, 316 U.S. 129, 132. *United States v. Krulewitch*, 145 F. (2d) 76, 156 A.L.R. 337, 345.

This court most recently applied the rule in *D'Aquino v. United States*, 192 F. (2d) 338, 375, and in denying production said:

“We think that the correct ruling is that recited in *Goldman v. United States*, 316 U.S. 129, 132, 62 S. Ct. 993, 995, 86 L. Ed. 1322, to the effect that it is ‘the better rule that where a witness does not use his notes or memoranda in court, a party has no absolute right to have them produced and to inspect them.’ That case also held that under the circumstances here existing, whether the Government’s files be produced should in general be a matter for the determination of the trial judge.

“It is apparent that what was sought here was but a part of the work papers used by the prosecutor in preparing the case. There was a complete lack of showing that the papers in question were relevant for the purpose of impeachment. Cf. *Arnstein v. United States*, 54 App. D.C. 199, 296 F. 946. We think it cannot be said that in refusing to require production of this paper the court abused its discretion.” (375)

See also *United States v. Walker*, 190 F. (2d) 481, 483, (2nd Cir.); *United States v. DeNormand*, 149 F. (2d) 622, 625; *United States v. Dilliard*, 101 F. (2d) 829, 837 (2nd Cir.); *United States v. Muraskin*, 99 F. (2d) 815, 816; *United States v. Rosenfeld*, 57 F. (2d)

74, 76; *Arnstein v. United States*, 296 Fed. 946, 950. This claim for production of prior statements of witnesses is not novel, but appears in practically every case in which witnesses have appeared before a Grand Jury. The rulings are similar—in the absence of a showing of prior material contradiction, production will be denied. *United States v. Cohen*, 145 F. (2d) 82, 92.

We have then a consistent body of law and practice supporting the non-production of such prior statements. The reason for the rule is clear. Since the witness himself has testified, his prior statements are hearsay and purely collateral. In the ordinary case their use could only promote confusion of issues; that is to say, the transfer of the issue from the facts as they happened to the issue of what the witness has said about the facts. Courts will depart from the highway of direct testimony to enter such thorny thickets only when a showing is made of evidentiary facts to be harvested. The rule, of course, works both ways. The government is not entitled to root around among defense counsel's work papers for prior statements of *its* witnesses on the chance that something inconsistent may turn up.

In this case no showing whatsoever of prior material contradictions had been made. Appellants were not entitled to the production of the statements sought.

Complaint is made of the failure to make available for inspection Mr. Whiteside's confidential report.

Careful reading of the transcript indicates that while such report was produced in court, it was not used by the witness in giving any of his testimony nor was it referred to by him as a basis for any of his testimony (612, 614). Under the circumstances it did not become evidence. *D'Aquino v. United States*, 192 F. (2d) 338, 375.

Nor did this witness use any record or notes of what had been said to him by Dr. Mitchell on prior occasions. Since the records and notes were not used there was no requirement that they be produced. The situation is on all fours with that of the notes and recordings in *Goldman v. United States*, 316 U.S. 129, 131-132.

C. Impeachment of Dr. Mitchell by reference to his prior statements followed an appropriate procedure.

Complaint is made that a statement was shown to Dr. Mitchell during his cross-examination without at the same time being shown to his counsel.

On cross-examination, Dr. Mitchell was asked whether he had on a prior occasion given certain testimony under oath to the Bureau of Internal Revenue in November, 1950 (1686). A record of the specific question and answer about which he was being interrogated was shown to him on the stand but not to his counsel, who then objected.

The purpose of the questioning was to show a prior inconsistent statement for impeachment purposes. Dr. Mitchell, of course, was present at the giving of his

own statement in 1950 as was his counsel, Mr. Theodore Roche, Jr. (1729). Such statement was thus no secret to Dr. Mitchell or his attorneys except insofar as details of a previous narrative at variance with his present testimony may have escaped their recollection.

The subject matter of this specific cross-examination was as follows: On direct examination Dr. Mitchell testified that he had discussed with Mrs. Cowart in January, 1947, the subject of giving money to Mrs. Mitchell (1632-1633). On cross-examination he admitted he had testified in 1950 that he had never discussed any diversion of funds with Mrs. Cowart (1688, 1689). This, of course, was inconsistent with his direct testimony. On redirect examination, Dr. Mitchell testified that he had first recalled this discussion with Mrs. Cowart some time in 1952 when in the course of going over his checkbooks it suddenly flashed upon him (1735). No further reference was made on redirect examination to his 1950 statement, nor was request made to examine and use the statement at that time.

The substance of the transaction, then, is that Dr. Mitchell testified about a conversation he had had with Mrs. Cowart; that he had previously testified there were no such conversations; that the explanation of his previous testimony was that he had forgotten about this conversation until quite recently. We thus have a completed explanation by Dr. Mitchell as to his prior testimony. No possible in-

jury resulted to him from the procedure followed in bringing out this sequence of events.

The usual method of impeaching a hostile witness by prior testimony is to show a record of his testimony to the witness, and ask if he made such a statement. The document itself is merely a prod to recollection. If it prods or refreshes the witness's recollection we then have affirmative testimony from the witness as to what he said on a prior occasion and the document is never used as evidence. Since the witness is admittedly hostile no danger of improper suggestion can result. Such a document is frequently used to impeach or refresh a witness on several different subjects during the course of the interrogation. An instance of such multiple use occurred here (1688, 1715). For that reason counsel is generally permitted to control the use of the document until the cross-examination is concluded.

On redirect examination the document becomes fully available for study and use by opposing counsel. The defense used this procedure at this trial in connection with the testimony of Mrs. Cowart. At the conclusion of her testimony, defense counsel asked to inspect and was given the grand jury transcript used during her direct interrogation (284) and made later use of the transcript himself (832).

This is an appropriate procedure. *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 231-237. There the Supreme Court held it was proper under the circumstances for the government to use grand

jury transcripts to refresh the recollection of hostile witnesses without showing the transcripts or the portions used, either to the defendants, the witnesses, or their counsel. The court held that procedures in these matters are not subject to ironclad rules but are matters resting in the discretion of the court. See also *United States v. Dilliard*, 101 F. (2d) 829, 837, (2 Cir.); *United States v. M. Kraus & Bros.*, 149 F. (2d) 773, 775-776; *Phillips v. United States*, 148 F. (2d) 714, 717; *Wigmore on Evidence*, §§755, 765.

There are, of course, other practices which could be followed. Professor Wigmore forcefully argues against any requirement of showing the record of the prior statement, even to the witness. *Wigmore on Evidence*, §§1259, 1260, 1261, 1263. Professor Wigmore claims that the practice abolishes a most effective mode of discrediting a witness on cross-examination and should be abandoned, as it has been in England for many years. *Wigmore on Evidence*, §1260, p. 502, §1263, p. 518.

Professor Wigmore indicates that where the document is shown to the witness, opposing counsel is entitled to inspect the document *before the witness leaves the stand*. This is in harmony with the practice fixing the appropriate time for inspection and use of the document during rehabilitation of the witness on redirect examination. *Wigmore on Evidence*, §1261, 1896.

The procedure followed was an acceptable procedure. No possible prejudice resulted to appellants.

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 231-237; *United States v. M. Kraus & Bros.*, 149 F. (2d) 773, 775.

D. The court properly refused to admit evidence relating to the years 1949 and 1950 under an indictment charging tax fraud for the year 1947.

Exception is taken to the refusal of the trial court to permit appellants to introduce figures relating to their financial affairs during 1949 and 1950. These were years following the discovery of the scheme and could have no bearing on the presence or absence of criminal intent during 1947. The uncovering of the particular fraud in this case took place in August, 1949. Subsequent events were remote and collateral.

The court permitted the defense full latitude in developing accounting testimony over a period of two weeks, with exhibits produced by the suitcase load. Mr. Lukes gave his analysis of figures for 1945, 1946, 1947, and 1948 (1147-1149). To entertain further financial analysis two and three years subsequent to the indictment year would bring a whole new field of evidence and prolong the trial on an essentially uncontested issue, viz., that there had been a substantial amount of unreported income in 1947. The evidence was properly excluded as remote and collateral.

In *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 228-231, the Supreme Court sustained the action of the district court in refusing to receive evidence relating to matters subsequent to the indict-

ment. See also *Pittsburgh Glass Co. v. Board*, 313 U.S. 146, 157-163; *Grell v. United States*, 112 F. (2d) 861, 874-876; *United States v. Stoehr*, 196 F. (2d) 276, 281-283; *Steinberg v. United States*, 162 F. (2d) 120, 125; *United States v. Lustig*, 163 F. (2d) 85, 90.

CONCLUSION.

After a trial of one month appellants were convicted of four counts of income tax evasion and one count of conspiracy. The proof showed a carefully designed scheme of tax fraud which included four of the five badges of fraud set forth in the *Spies* case, any one of which may be sufficient by itself to prove the crime of wilful attempt to evade income taxes.

The principal issue at the trial involved the presence or absence of criminal intent of appellants, the defense being, in the case of Dr. Mitchell that he had no knowledge of the scheme, and in the case of Mrs. Mitchell that she had only matrimonial security in mind. This defense was in the teeth of the evidence of Mrs. Peirson and Mrs. Cowart.

The jury found there had been a fraudulent tax scheme. The evidence supported the verdict. The instructions were appropriate to the main issue—that is to say, criminal scheme versus complete ignorance. The evidentiary and procedural points are either not well taken, or are matters of trial discretion which may be appropriately handled in more than one

manner, or are matters of such minute importance in the course of the trial as a whole as to have not the slightest effect on the result. As was said in *Glasser v. United States*, 315 U.S. 60, 83, the court should be careful to avoid the magnification on appeal of instances which were of little importance in their setting. *Federal Rules of Criminal Procedure* 52(a); *Zamloch v. United States*, 193 F. (2d) 889, 894.

The judgment in this case of flagrant fraud abundantly proved must be affirmed.

Dated, San Francisco, California,
January 13, 1954.

LLOYD H. BURKE,
United States Attorney,
MACKLIN FLEMING,
Special Assistant to the United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix

“Voir Dire Examination of Prospective Jurors

ABRAM H. HERSHLER,

a prospective juror, was duly sworn and examined on voir dire, as follows:

The Court: Your occupation, Mr. Hershler?

A. I am an executive with a corporation.

Q. What is the name of the corporation?

A. Bancroft Whitney Company.

Q. You are not a lawyer?

A. No, I am not.

Q. Do you have anything to do with the sale of law books over there?

A. I personally, do you mean, or the company?

Q. You personally. I know the Bancroft Whitney Company sells law books.

A. That's right. Well, I personally don't have any direct connection with the sales. Beyond that we do plan the publications that we are going [2*] to sell.

Q. Well, have you had any legal training?

A. No, not training.

Q. Well, has your experience with the company given you any familiarity with it?

A. I am afraid to answer. It has to a very limited degree.

Q. Are you acquainted with Mr. Dana, the gentleman here in the blue suit?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

A. No. I have seen him, but I don't know him.

Q. You get around the court very much in your work?

A. I have in the past.

Q. And in what way, as a salesman?

A. No. I had charge of the public relations for a while and I had contacts both with the Supreme and Appellate Courts and in Los Angeles with the Federal Courts.

Q. Do you know Dr. Mitchell?

A. No, I don't.

Q. Or his wife? A. No.

Q. Nor, I assume, you know none of these gentlemen here at counsel table?

A. I don't think so.

Q. Have you ever had any difficulty with the Bureau of Internal Revenue, Mr. Hershler?

A. Well, about 25 years ago there was some question as to my having made a return because of my residence in a foreign [3] country. But that was settled.

Q. And in a friendly fashion, I take it?

A. Very friendly.

Q. Did you come away from that experience with any feeling of animosity towards the Bureau or any of its agents? A. No.

Q. It has been developed here, as you observe, that Dr. Mitchell is a practicing physician and surgeon here. Do you feel that if you were selected as a juror you would treat him any differently because of that? A. No.

Q. I take it that you believe with the rest of us that the Government has a right to see to it that the laws with respect to income tax evasion are strictly complied with? A. Yes.

Q. You have no quarrel with that principle?

A. No.

Q. Do you feel that if you were selected to serve here you could do so, independently exercising your own good judgment and consult with your fellow jurors when the time comes for your deliberations and arrive at a verdict that in your judgment would be a proper one to all sides?

A. I think so. There is one qualification. I read the reports of the first trial in the newspapers. I read them practically every day. So I am a little more familiar with [4] this case than——

Q. Pardon me. Did the reading of those newspaper accounts cause you to form an opinion as to the guilt or innocence of these defendants?

A. Well, I suppose I had an opinion as I read them, yes.

Q. Well, is that opinion one which you entertain now? I mean, do you have a present opinion as to the guilt or innocence of these people?

A. Well, I would say presently I don't have any opinion. I don't suppose. I don't know unconsciously whether I may have or not. I don't know.

Q. But, in other words, you are going to listen to the evidence, if you are selected here, and make up your mind when all the evidence is in and you

have heard the arguments of counsel and the instructions of the Court; is that correct?

A. Correct.

The Court: All right.

Mr. Fleming: I have no questions.

Mr. Dana: I have one inquiry of the juror, if he would be willing to have him try his own case if he were in Dr. Mitchell's position.

The Court: Yes, I will ask that question.

Q. If you, Mr. Hershler, found yourself in the unfortunate position now occupied by Dr. Mitchell and his wife, would you be willing to have your case determined and passed upon [5] by a jury composed of 12 people whose frame of mind is the same as that of yours at the present time?

A. Do you say "willing" or "prefer"? Would there be any difference in your question?

Q. No, I don't think so. The choice of words is not important. Would you be willing—I will put it that way—to have your case tried by 12 people in your frame of mind?

A. I would be willing, but I wouldn't prefer it.

Mr. Dana: Would the Court ask if he would prefer not to have?

The Court: Would you prefer not to?

A. I would prefer not to. I would prefer to have it tried by the judge.

The Court: All right.

Mr. Fleming: No further questions.

Mr. Dana: No further questions.

Mr. Fleming: The Government will pass.

Mr. Dana: We will excuse Mrs. Casey.

The Clerk: You have exhausted your challenges.

Mr. Fleming: The Government will pass.

Mr. Dana: May we have a conference then for a few minutes? I am not quite sure that I follow——

The Court: You have exercised all your challenges.

Mr. Dana: Well, then, I will at this time exercise what I believe would be a challenge for cause as to [6] Juror—as to Juror No. 2 (Mr. Hershler) because of the statement he prefers not to have his case tried by 12 people in his frame of mind.

The Court: Denied. I think we have a frank appraisal of his views. I don't think there is any question of cause involved here.

Mr. Dana: Well, if that be the ruling of the Court, it will have to be such.

The Court: All right. Swear the jury.

(Thereupon the jurors were sworn to try the cause; and thereupon two alternates were chosen, and duly sworn as alternates.)

* * *.’ (Pages 56-60)

“* * * * *

The Court: The jurors remaining in the body of the courtroom may be excused when I conclude my instructions to this jury.

Now, as I have repeatedly indicated to you, ladies and gentlemen, we start the trial of this case this afternoon at 2 o'clock. We are starting, if I may use

the expression, from scratch, so that you are not to read anything in the newspapers concerning this case, you are completely to disregard any impression that may have been created in your mind concerning it, and you are to remember that you are to try the case wholly upon the evidence which is received in this courtroom; and I further instruct you and admonish you and caution you to refrain from reading anything further [10] about the case in the newspapers. Now, that admonition I give you in all seriousness and I think you should regard it. Of course if you do read anything in the newspapers about it, I have no control over that, I won't know it. And I would also ask you to refrain from listening to any radio broadcasts which may appear on the various news hours, news items, for the same basis that I have indicated to you above.

We will start the trial of the case this afternoon at 2 o'clock, and then we will go on tomorrow morning again.

You are now discharged with the admonition that you are not to discuss the case—I am required to give you this instruction—either among yourselves or with others, and that you are not to form or express any opinion about it until it is finally submitted to you.

We will now adjourn until 2 o'clock.

* * * .'' (Pages 63-64)

No. 13,884

IN THE

United States Court of Appeals
For the Ninth Circuit

VAUGHN H. MITCHELL and

DOROTHY MITCHELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

ARGUMENT.

Introductory.—Appellee's Brief contends that a portion of our point I and all of our point III, both relating to the instructions, should be disregarded because those points were not raised below in compliance with Rule 30, Rules of Criminal Procedure. Both points were first raised by trial counsel in the arguments on motion for a new trial (R. 1984-1985; R. 1978-1979).

Appellee's Brief fails to refer to Rule 52(b), and to the fact that it was settled law before Rule 52(b) was adopted, and has continued to be so since, that substantial errors in the instructions will be considered on appeal, even though not raised below. Such was the law

before 1946, when Rule 52(b) became effective. *Screws v. United States*, (1945) 325 U.S. 91, 106-107; *Anderson v. United States*, (CA 9, 1946) 157 F. 2d 429. The *Screws* case is a particularly pertinent authority, for in it the Supreme Court held that wilfulness when used in a civil rights statute means precisely what it means in the statute on which the indictment herein was based, and reversed the conviction because the instruction failed to explain wilfulness properly. No exception had been taken below to the instruction, but the Supreme Court held that it was required to reverse anyway, because the error was "so fundamental as not to submit to the jury the essential ingredients of the * * * offense."¹

Subsequent to the adoption of Rule 52(b), the rule has been held the same. *Fisher v. United States*, (1946) 328 U.S. 463; *Samuel v. United States*, (CA 9 in bank, 1948) 169 F. 2d 787; *Jones v. United States*, (CA 9, 1949) 175 F. 2d 544; *Schino et al. v. United States*, (CA 9, Dec. 2, 1953) F. 2d, 54-1 USTC 9105; *United States v. Raub*, (CA 7, 1949) 177 F. 2d 312; *United States v. Balodimas*, (CA 7, 1949) 177 F. 2d 485; *Tatum v. United States*, (CA D.C., 1951) 190 F. 2d 612.² This Court stated the proposition succinctly in the *Samuel* case:

"In a criminal case the court must instruct on all essential questions of law involved, whether or not

¹Although several justices dissented, none disputed the propriety of considering the assertion of error.

²At several places in Appellee's Brief, the suggestion is obliquely made that the errors at the trial should be glossed over because the trial lasted a month and there was sufficient evidence to convict. In each of these cited cases, as well as the two cited for the rule antedating the adoption of Rule 52(b), there was sufficient evidence to sustain the verdict, but wherever prejudicial error was found reversal resulted.

Furthermore, most of the error herein derived from the stubborn refusal of the prosecutor to entertain the possibility that objections timely made by the defence might be well taken. The prosecution has only itself to blame for the way it tried this case.

it is requested to do so. (Citations omitted.) We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.”

Accordingly, if the instructions were substantially prejudicial, this Court should reverse.

I. THE JURY WAS IMPROPERLY INSTRUCTED ABOUT THE MEANING OF WILFULNESS.

A jury charge is not an abstraction. Its function is to remove legal principles from the realm of the abstract and present them to the jury in terms suitable for application to the facts before that jury. The fault of the instructions given below lies in their tendency to mislead the jury concerning the law applicable to the evidence *in this case*.

It is no answer to our challenge to reply, as Appellee’s Brief does, that (1) there are abstract statements in the charge which are unobjectionable,³ and (2) the same charge was not found objectionable in other cases where the evidence did not present the same issue.

In our opening brief we cited four decisions⁴ which emphasize that a correct abstract charge will not save an incorrect concrete charge. Characteristically, Appellee’s

³Even here, appellee does not distinguish good from bad. Appellee’s brief, p. 9, refers approvingly to the language we object to: “responsibility of at least good faith and ordinary diligence.” The brief fails to reply to our point that the presence in that language of the conjunctive “and” converts it into a standard of negligence.

⁴*Bollenbach v. United States*, (1946) 326 U.S. 607; *Spurr v. United States*, (1899) 174 U.S. 728; *United States v. Link*, (CA 3, 1953) 202 F. 2d 592; *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. 345 U.S. 917.

Brief does not refer to or attempt to distinguish any of them.⁵ Perhaps this is intended to be an admission that the principle for which we cited them is too well established to be challenged.

Appellee argues that an instruction is to be read as a whole, citing *Boyd v. United States*, (1926) 271 U.S. 104. We agree both with the rule and the citation, which is a case where a patent ambiguity disappeared when the doubtful passage was read in the context of the whole. Neither the rule nor the citation, however, supports the conclusion that a jury can be relied on to disregard erroneous paragraphs in an instruction because elsewhere the erroneous passages are contradicted by unobjectionable passages. If the jury knows enough law to disregard the bad and be guided only by the good, it is difficult to explain why judges need instruct juries at all.

The instant case is, however, devoid of even this difficulty. We do not have here two conflicting concrete instructions. We have a short, correct abstract statement later explained by three paragraphs of erroneous concrete statement. This is reversible error.

The suggestion in Appellee's Brief (p. 13) that this Court and other courts have approved this identical instruction is explainable only by appellee's apparent belief that a canned instruction unobjectionable in one case is unobjectionable in all. But this is not so, for, as we have said, a jury charge is not an abstraction.

⁵It does, however, cite on another point *United States v. M. Kraus & Bros., Inc.*, (CA 2, 1945) 149 F. 2d 773, without, however, calling the Court's attention to the fact that that decision was reversed in *M. Kraus & Bros., Inc. v. United States*, (1946) 327 U.S. 614. The Supreme Court decision held that a bad instruction was reversible error even though it was mingled with good passages, citing the *Bollenbach* case, *supra*.

It is true that substantially the same instruction was included in that given the jury in *United States v. Banks*.⁶ It is not true that the appellate court considered the propriety of that instruction. Furthermore, as in the cases from this Court where appellee states the same instruction was given,⁷ the instruction could not possibly have been prejudicial on the facts actually presented. In none of the cases cited could the jury have been misled by a confusion between negligence and wilfulness, or by an injection of tort principles of *respondet superior*. Where, as in the instant case, such confusion could have misled the jury in a concrete situation instead of an abstract one, similar instructions have been held reversible error. *Lurding v. United States*, (CA 6, 1950) 179 F. 2d 419, 421; *Inland Freight Lines v. United States*, (CA 10, 1951) 191 F. 2d 313, 316.

Accordingly, the defendants were prejudiced by the improper instruction that they were criminally liable for negligence and for the acts of others. The conviction should be reversed.

⁶(D. Minn., 1952) 108 F. Supp. 14, aff'd (CA 8, 1953) 204 F. 2d 666, cert. den. No. 259, Oct. Term 1953, 74 S. Ct. 73.

⁷An examination of these decisions (*Remmer v. United States*, (CA 9, 1953) 205 F. 2d 277, 290, cert. granted No. 304, Oct. Term, 1953; *Barcott v. United States*, (CA 9, 1948) 169 F. 2d 929, 932; and *Sullivan v. United States*, (CA 9, 1935) 75 F. 2d 622), will demonstrate that this Court was not asked to pass on the instructions we here challenge. We have examined the defendant's briefs filed in this Court and in the Supreme Court in the *Remmer* case, and find no discussion of this instruction, although other instructions were challenged. It is obvious from the facts in the *Barcott* case that the defendant's criminal responsibility for the acts of others or for his own negligence was not an issue in it. The *Sullivan* opinion shows affirmatively that the instructions were free from error and the point we raise was not present.

II. THE CHARGE ERRONEOUSLY INJECTED ELEMENTS OF A LESS SERIOUS OFFENCE FOR WHICH DEFENDANTS WERE NOT INDICTED.

Appellee seeks to defend this error on the ground that acts constituting the lesser offence might, when taken with other acts, properly establish guilt of the offence charged herein. This attempted justification is insufficient.

The instructions contain an adequate discussion of the relevance of the acts referred to. This discussion is quoted on page 10 of Appellee's Brief, and appears at R. 1942-1943. It was this charge to which we had reference at p. 51 of our opening brief. This charge was sufficient. It was error and was substantially prejudicial for the trial judge later to inform the jury that the law required defendants to keep "sufficient" records. The error lay in the failure to inform the jury (1) that failure to keep "sufficient" records was not an offence unless it was "willful," and (2) that such failure was not charged as a crime and was not alone enough to warrant a conviction. *Brink v. United States*, (CA 6, 1945) 148 F. 2d 325, 328; *Spurr v. United States*, (1899) 174 U.S. 728.

III. THE INSTRUCTIONS IMPROPERLY FAILED TO INSTRUCT THE JURY THAT DEFENDANT DR. MITCHELL WAS CONCLUSIVELY ESTABLISHED TO BE INNOCENT OF INTENT TO EVADE TAXES IN THE YEARS 1942-1946.

Appellee's principal defence for this error is that trial counsel did not properly preserve it below. As we have shown above, under Rule 52(b) this error should nevertheless be considered.

Appellee's Brief (p. 17) attempts to justify this error by setting forth the simple syllogism on which the prosecutor evidently based his conclusion that he could ignore the fact of prior acquittal. It will be observed that no

authority is cited for a single premise of the syllogism⁸ or a single statement made. The fact that the Supreme Court's decision in *Sealfon v. United States*, (1948) 332 U.S. 575, should leave no doubt on this point is ignored as completely as if our opening brief had not discussed it at all.

Elsewhere in the brief (pp. 28-32) appellee demonstrates the relevance the evidence regarding 1942-1946 would have had absent the prior acquittal. We have, however, not challenged the admissibility of the evidence but merely the failure of the trial judge to instruct the jury properly about the inferences that could be drawn from it.

Appellee's discussion therefore entirely fails to be responsive to the res judicata issue involved in this case.

IV. THE TRIAL COURT ERRONEOUSLY DENIED DEFENDANTS THEIR RIGHT TO CROSS-EXAMINE A KEY PROSECUTION WITNESS.

Appellee dismisses this ground of defendants' appeal with the bare assertion that it is only "a matter of form" involving the "use of leading questions." (Appellee's Br. 24.) Therefore, appellee concludes, the matter is one for the trial court to determine within its recognized discretion to control cross-examination of witnesses.⁹

⁸The premise that a conviction would never be res judicata ignores *Emich Motors Corp. v. General Motors Corp.*, (1951) 340 U.S. 558, 568-570; *Local 167 v. United States*, (1934) 291 U.S. 293, 298-299; and *Frank v. Mangum*, (1915) 237 U.S. 309, 334.

⁹The cases cited in Appellee's Brief (p. 27) deal with examples of the trial court's restriction of the scope of cross-examination, not with its complete denial. None of them is, therefore, in point. The trial court's discretion to control the scope of cross-examination does not include power to prohibit it. *Alford v. United States*, (1931) 282 U.S. 687.

In the first place, no federal case cited by appellee, nor any we have been able to find, sustains the right of a trial court to prohibit the use of leading questions on cross-examination. *St. Clair v. United States*, (1894) 154 U.S. 134, held that in its discretion the trial court could *extend* the right to use leading questions to the direct examiner. It did not involve the right to *restrict* such use where normally it is proper. The only federal case which we have found involving the point at issue here is *Arnette et al. v. United States*, (CA 4, 1946) 158 F. 2d 11, where the court said: "it is no ground for excluding leading questions on cross-examination that the witness is favorable to the side of the examiner."

Furthermore, we cannot imagine how any party could be in a weaker position to dismiss the denial of the right to use leading questions as a mere matter of form than the prosecution is here. The prosecution called this witness as an adverse witness (R. 264) and proceeded to examine her on direct examination by frequent use of leading questions, there being eight of them in the first three pages of the examination (R. 265-267). If this were unimportant, as appellee now contends, why did appellee depart from the usual procedure?¹⁰

In the second place, more than the right to use leading questions was denied to the defence. After the prosecution had indulged itself with all the privileges of a cross-examiner, defence counsel began cross-examining in the usual way, only to be brought up short by a ruling that

¹⁰Appellee's characterization of this right which the prosecution claimed exclusively for itself intimates that we may have hit the mark when we suggested (Op. Br. 63) that the real motive of the prosecution in calling this witness as adverse was to get "before the jury, under the guise of impeachment," the grand jury transcript. Characteristically, Appellee's Brief makes no attempt to answer our point that this was independent reversible error, nor to distinguish the many cases, including *Kuhn v. United States*, (CA 9, 1928) 24 F. 2d 910, cert. den. 278 U.S. 605, which so hold.

he must ask direct questions. In answer to a question from defence counsel, the trial court stated that the defence could not cross-examine. (R. 758-759.) Interestingly enough, during that discussion the prosecutor volunteered the suggestion that defence counsel could "call the witness himself as his own witness and question fully in regard to these things" (R. 759). Since that would clearly have deprived the defence of the right to ask leading questions, the prosecutor's suggestion would not have expanded any defence rights which the ruling abridged, if leading questions had been all that were involved.

Further impairments of effective cross-examination soon developed. These may be found at R. 824-827, 828-831, 835-836, 839-841. They have been discussed at pages 65-66 and 70-71 of our opening brief, and have been ignored, not answered, by Appellee's Brief. As can be seen from the record, so little latitude was allowed defence counsel that he was finally driven to make the witness his own witness (as the prosecution had earlier suggested he do) in order to examine her at all.¹¹ (R. 836-837.)

¹¹This desperate measure was taken after the following events occurred in sequence: the defence was denied the right to explore the circumstances in which the witness had given the testimony to the grand jury about which she had testified on direct (R. 825-826); it was denied the right to develop the witness' then state of mind due to her husband's cancer (R. 827-828); it was denied the right to interrogate her about her grand jury testimony concerning what defendant Dorothy Mitchell had told her (R. 830). At this point defence counsel was even denied the privilege of making an offer of proof in chambers out of the jury's presence (R. 830-831). Finally, an obviously proper question designed to test her knowledge of the facts at the time she gave the grand jury testimony the prosecutor had already put into the record was objected to as a "leading question, not covered by the direct." When this objection was sustained (R. 835), defence counsel surrendered and made the witness his own (R. 836-837), thus putting to an end the prosecution's fears that the defence would be able to impeach her.

It is therefore evident from the record that this is an even more flagrant case of impairing the right of cross-examination than *Alford v. United States*, (1931) 282 U.S. 687. Nor can this error be excused on any ground that the witness was not important. As appellee itself says, "A reading of the record indicates that the cause was primarily one of credibility of witnesses. The jury chose to believe Mrs. Cowart and Mrs. Pierson and to disbelieve appellants." (Br. 7.) But appellants were cross-examined; Mrs. Cowart was not. Since Mrs. Cowart's testimony and credibility were admittedly so crucial to the prosecution's case, the convictions below must be reversed in order that her story, like those of all the other witnesses, may be tested by cross-examination.

**V. THE DISQUALIFIED JUROR SHOULD HAVE
BEEN DISMISSED.**

We do not contend that a defendant is entitled to a jury free of any prior impressions, contrary to what Appellee's Brief (p. 18) charges, but we do contend that a defendant is entitled to a jury free of "positive and decided opinion." This is what *Reynolds v. United States*, (1879) 98 U.S. 145, 157, held was the constitutional standard, and this is what the defendants herein did not get.

The quotations from the *Reynolds* opinion in Appellee's Brief (pp. 20-21) are good law today, as is the extract from that opinion which we have quoted above. Our complaint is that the judge did not ask the prospective juror directly if he had a positive opinion, and did not understand that his answers to the indirect questions indicated that he had.

Characteristically, Appellee's Brief fails to discuss the two cases we cited which disqualified jurors on substan-

tially identical facts, but instead contents itself with generalities. To one of these we must take exception. The suggestion that all intelligent prospective jurors have some opinions about the specific cases they are to hear, based on their reading the newspapers (Appellee's Brief p. 19), is contrary to notorious fact. Few people not professionally concerned with the administration of criminal justice select such news to read in advance of the actual trials, except in the exceptional case which inspires headlines. This was not such a case. Undoubtedly more people knew of it because it had been tried once before than if it had not, but a defendant at a second trial has the same constitutional rights as one at a first trial.

VI. REFUSAL OF THE COURT BELOW TO COMPEL PRODUCTION OF AN IMPEACHING STATEMENT IS REVERSIBLE ERROR.

The statement in question is that taken of *Dr. Mitchell* by the government on November 13, 1950. It was this statement which the prosecutor used on cross-examination to impeach *Dr. Mitchell*. And it was this statement which was denied to the defence, although request was made for its inspection. (R. 1686-1691.)

In its brief, appellee makes three arguments to support the court's ruling: (1) the statement was shown to *the witness*, if not to defence counsel; (2) defence counsel, independently of the statement, attempted to reconcile the inconsistencies; and (3) the procedure followed in the use of *Mrs. Cowart's grand jury statement* was "appropriate" and "acceptable." None of these arguments has any merit.

The first ignores the fundamental right of the defendants to use the complete document, after the prosecution

has used parts of it for impeachment. *Chicago, M. & S. P. Ry. Co. v. Artery*, (1890) 137 U.S. 507, 520; *Home Benefit Association v. Sargent*, (1892) 142 U.S. 691, 695. The fact that the statement was shown to the witness, who was Dr. Mitchell, one of the defendants, does not satisfy this rule. It is defence counsel who represents the defendants before the court, and it is he who must make the necessary selection and evaluation of evidence on their behalf. Thus, the defence's right to introduce the whole of the impeaching statement¹² was subverted by the court's ruling.

The second contention also ignores the same rule. Furthermore, it rests upon a misinterpretation of the record, caused by the prosecution's erroneous insistence that the November 13, 1950 statement of Dr. Mitchell not be marked for identification (R. 1690-1691). On redirect examination, defence counsel then asked Dr. Mitchell about his *June 26, 1947* statement, also voluntarily given to the government. It was at this point, without any mention of the 1950 statement which is the one in issue, that the Doctor was asked when he first recalled talking to Mrs. Cowart of Mrs. Mitchell's withdrawals. (R. 1732-1735.)¹³ Had the prosecution permitted these statements to be identified, this confusion would not have occurred.

The third argument is not understandable. The fact that in this respect the court and the prosecutor handled the Cowart grand jury statement properly can scarcely eliminate or even atone for their error in handling the Mitchell statement. Nor do the authorities cited support

¹²See the authorities cited at 83-84 of our Opening Brief. Appellee has made no attempt to answer or to distinguish these precedents.

¹³Moreover, by concentrating upon this one attempt of defence counsel to rehabilitate his witness *without having seen* the impeaching document, appellee overlooks its concession of "multiple use" of the statement by it on "several different subjects during the course of the (witness') interrogation" (Appellee's Br. 42).

this prong of its argument. *United States v. Socony-Vacuum Oil Co.*, (1940) 310 U.S. 150, 231, recognizes the rule established in our opening brief.¹⁴ Both *United States v. Dilliard*, (CA 2, 1938) 101 F. 2d 829, 837, and the references to *Wigmore on Evidence* merely deal with the right of the witness to see the impeaching document; as we pointed out in our opening brief (p. 83), Professor Wigmore says it is "universally conceded" that the opposing party may use the remainder of a statement first exploited by one party. *United States v. M. Kraus & Bros. Inc.*, (CA 2, 1945) 149 F. 2d 773, was reversed by the Supreme Court *sub. nom. M. Kraus & Bros. Inc. v. United States*, (1945) 327 U.S. 614. *Phillips v. United States*, (CA 2, 1945) 148 F. 2d 714, 717, the last of appellate's authorities, is, like the *Socony-Vacuum* decision, an illustration of the lack of prejudice which results when the material sought to be produced is cumulative to matter "appear(ing) elsewhere in the record."

For its error in suppressing the Mitchell statement, the court below should be reversed.

¹⁴"Normally, of course, the material so used (for refreshing a witness' recollection) must be shown to opposing counsel upon demand, if it is handed to the witnesses." 310 U.S. at 233. This normal rule was not applied in the Supreme Court's decision for three reasons, none of which is present here: (1) the material was used to refresh the witness' recollection, not to impeach his testimony; (2) the trial judge had personally examined the material and had instructed the jury it was not inconsistent; and (3) the material was cumulative to other competent testimony.

VII. REVERSIBLE ERROR WAS COMMITTED BY THE FAILURE TO PRODUCE FOR INSPECTION CERTAIN EVIDENTIARY STATEMENTS TAKEN BY THE PROSECUTION OF THE WITNESSES OR USED BY THE WITNESSES TO REFRESH THEIR RECOLLECTION.

In seeking support for the trial court's denial of defendants' request of the prosecution to produce documentary statements taken of the witnesses, Dr. Mitchell, Mrs. Cowart, and Mrs. Pierson, appellee makes but one argument, that defendants have not shown these statements were in fact inconsistent with the trial testimony of these witnesses.¹⁵ Hence, appellee argues, defendants were not entitled to see the statements.

Neither appellee's reasoning nor its conclusion stands the acid of analysis. The very premise of appellee's contention was the matter on which the Court of Appeals was reversed in *Gordon v. United States*, (1953) 344 U.S. 414. The Court of Appeals had held¹⁶ that the defendants Gordon and McLeod were not entitled to inspect the prior statements of their accomplice in the crime, because he had already confessed his prior statements were inconsistent with his present testimony. Therefore, the Court of Appeals could see no purpose in requiring the statements to be produced.

For this conclusion the Court of Appeals was reversed by a unanimous Supreme Court. In its decision, the Supreme Court dealt with the fact of admitted inconsistency as being not a help but rather an impediment to its conclusion that inspection was required.¹⁷

¹⁵However, by its later use of the Dr. Mitchell statement, the prosecution itself sought to establish inconsistencies between his trial testimony and this earlier statement (R. 1686-1691).

¹⁶*United States v. Gordon*, (CA 7, 1952) 196 F. 2d 886, 888.

¹⁷This analysis is based upon the Court's discussion of the point on pages 420-421, which is quoted in full in the Appendix, *supra*.

Nor do the other authorities cited by appellee support its position. Three of them were cited by the Court of Appeals in the *Gordon* case as a basis for its erroneous decision,¹⁸ and were expressly overruled by the Supreme Court.¹⁹ The other decisions cited antedate the Rules of Federal Criminal Procedure,²⁰ upon which the *Gordon* decision is founded.

Nor do *Hickman v. Taylor*, (1947) 329 U.S. 495, 504, or *Bowman Dairy Co. v. United States*, (1951) 341 U.S. 214, support appellee's contention. The former, under Federal Rule 26 of Civil Procedure, dealt with an attempt to force production of memoranda prepared by an attorney of his mental impression of his case. The latter, which applied Rule 17(c) of Federal Criminal Procedure, supports defendants' request for production. Contrary to appellee's assertion (Br. 36), it did not involve narrative statements²¹ of witnesses, since such statements were expressly excepted from the *Bowman Dairy* subpoena. All other documents of evidentiary value were ordered pro-

¹⁸*D'Aquino v. United States*, (CA 9, 1951) 192 F. 2d 338, 375 (concerning the prosecution's work papers, not used in court); *United States v. Walker*, (CA 2, 1951) 190 F. 2d 481, 483; and *United States v. Rosenfeld*, (CA 2, 1932) 57 F. 2d 74, 76.

¹⁹See the Court's language 334 U.S. at 419, where it states, "Despite some contrary holdings on which the courts below may have relied, we think their reasoning is outweighed * * *."

²⁰*Goldman v. United States*, (1942) 316 U.S. 129, 132; *United States v. De Normand*, (CA 2, 1945) 149 F. 2d 622, 625; *United States v. Dilliard*, (CA 2, 1938) 101 F. 2d 829, 837; *Arnstein v. United States*, (CA D.C., 1924) 296 F. 946, 950; and *United States v. Cohen*, (CA 2, 1944) 145 F. 2d 82, 92, all cited at Br. 38-39. The Rules of Criminal Procedure became effective March 21, 1946. Rule 59, 18 U.S.C. Rule 59; *Singleton v. Botkin*, (D. D.C., 1946) 5 F.R.D. 173; *United States v. Claus*, (E.D. N.Y., 1946) 5 F.R.D. 278.

²¹It appears affirmatively from the record that the Dr. Mitchell statement was not narrative but was in question and answer form (R. 1686-1691).

duced.²² Certainly the best evidence rule as applied in the *Gordon* case, *supra*, requires that the several statements requested be produced for inspection in order that "the trial judge (might) understandingly exercise his discretion * * *." 344 U.S. at 420.

In defence of the trial court's suppression of the witness Whiteside's report, appellee argues that it had not been used in court as a basis for testimony (Br. 40). The record does not support appellee. The witness testified to a figure "shown in the civil report." Defence counsel requested the report, which was unavailable. The prosecutor then handed to Whiteside Whiteside's own report, saying that it too contained the figure. The witness then described the report in hand as his own. Thereupon defence counsel requested its production and offered it for identification. Both the request and the offer were denied. The witness then continued to testify what the report did and did not contain. (R. 612-615.) By this action, the prosecution made the report subject to production at defendants' request. By so using the report to impress the jury with the volume of work done by the witness and with the appearance that the witness' testimony was grounded upon an official report, the prosecution made that report subject to production at defendants' request. See cases previously cited (Opening Br. 89-90).²³

²²That these statements are "evidentiary" under the tests of *Bowman Dairy* is established in the recent decision of *Fryer v. United States*, (CA D.C., 1953) 207 F. 2d 134, 137, Govt's petition for cert. denied Nov. 17, 1953, 22 L.W. 3131. There the Court of Appeals held that "the defendant's statement, which was introduced into evidence, and statements by the witnesses, which might have been introduced for impeachment purposes, were clearly 'evidentiary' as *Bowman* requires." It was error to deny a request for their inspection.

²³*D'Aquino v. United States*, (CA 9, 1951) 192 F. 338, 375, the only case cited by appellee, did not rule upon the present situation; in it a request for production of a government report was denied because the report had *not* been used in court.

VIII. THE COURT BELOW SHOULD BE REVERSED FOR RECEIVING EVIDENCE OF ONE DEFENDANT'S DEFICIENCIES IN INCOME TAXES FOR REMOTE EARLIER YEARS.

Appellee argues in its brief (pp. 28-35) that the prosecution's evidence of Dr. Mitchell's deficiencies for 1938-1941 was properly received by the trial court for at least one of three purposes²⁴ therein stated. If any of these purposes is valid, appellee argues, the evidence was properly received under the doctrine of "multiple admissibility."

But in making this analysis, appellee misunderstands the issue raised in our opening brief, pp. 90-94. The point was there made that even relevant evidence must be excluded if its prejudicial effect outweighs its probative value. That the evidence of the Doctor's deficiencies for 1938-1941 was remote in time is self-evident. That it was also remote in nature and circumstance is shown by appellee's efforts to find a plausible purpose to which the evidence might relate.

The first of these efforts (and the record references cited by appellee in support of it) relates solely to the years 1942 to 1946. See Appellee's Brief, pp. 29-32. The years complained of are 1938 to 1941.

Nor is the second purpose sufficiently pertinent to justify the court's receipt of evidence of prior crimes. The issue on which this evidence was offered, i.e., whether or not the Doctor had paid in full all his prior taxes, was clearly collateral to his guilt for 1947. To restate the effect of the evidence, as appellee has done, does not contribute one iota to its relevancy.

²⁴Each of these purposes relates only to Dr. Mitchell. Appellee makes no answer to our contention that the evidence was clearly bad as to Dorothy Mitchell, Dr. Mitchell's wife and co-defendant, since she was not married to him until 1944 (Opening Br. 91-92). Apparently no answer can be made.

The third ground, that the evidence was available to impeach Dr. Mitchell's credibility, ignores the record. Dr. Mitchell was not the witness at the time the prosecution insisted upon introducing this evidence, nor had he been one. No procedure permits a witness, especially if he is the defendant, to be impeached *before* he takes the stand—in fact, before it is even known whether or not he will testify. For a court to permit the prosecutor to investigate his past crimes under the *Michelson* rule²⁵ makes a mockery of his constitutional right not to be a witness against himself, and in effect forces him to be a witness later in order to explain or rebut the impeaching evidence already received.

IX. REFUSAL OF THE COURT BELOW TO ADMIT DEFENDANTS' EVIDENCE OF THEIR CASH RECEIPTS IN 1949 AND 1950 IS REVERSIBLE ERROR.

In its answer to this ground of reversal, appellee has raised two arguments in defence of the court's ruling: first, appellee claims that defendants' proffered evidence was properly excluded since it was based on "years following the discovery of the scheme" (Appellee's Br. 44); second, appellee cites cases to establish that cumulative evidence is not proper and therefore the court below was correct.

Both arguments are far afield of this case. The first contention, supported by the *Stoehr* and *Steinberg* decisions,²⁶ has no application to this evidence, the force of which was to provide a means of testing the accuracy

²⁵*Michelson v. United States*, (1948) 335 U.S. 469, 475-476, cited by appellee on pages 32 and 34 of its brief.

²⁶*United States v. Stoehr*, (CA 3, 1952) 196 F. 2d 276, 281-283; *Steinberg v. United States*, (CA 5, 1947) 162 F. 2d 120, 125.

of the prosecution's comparison of 1946 and 1948 cash receipts with those of 1947. Here the fact that the years 1949 and 1950 were *after* 1947 is no bar to their use as a standard for comparison;²⁷ to the contrary, the relevancy of 1949 and 1950 as standards is strengthened by this very fact. Since the defendants' report of their 1949 and 1950 cash receipts was not completed until after the 1947 indictment, the defendants understandably would be more cautious in compiling this report than normally. Since the defendants were indicted for 1947 principally because of the low ratio of cash receipts to total receipts in that year, evidence of receipts in similar ratio in years after the indictment bear an unusual seal of accuracy and completeness. "Once bitten, twice shy," is the folk expression for this certificate of correctness.²⁸

Moreover, it lies ill with the prosecution to argue that 1949 and 1950 were irrelevant because these years relate to subsequent events. The prosecution itself, in first making its damning comparison, used 1946, an earlier year, and 1948, a subsequent year. Having itself chosen a subsequent year, the government can now draw no logical limitation to the use of others by the defendants.

And, finally, the record itself serves to destroy appellee's argument. After having been unsuccessful in introducing evidence of cash receipts in 1949 and 1950, defence

²⁷*United States v. Socony-Vacuum Oil Company*, (1940), 310 U.S. 150, 228, cited by appellee (Appellee's Br. 44), does not establish a rule excluding evidence of all subsequent acts. In *Johnson v. United States*, (1943) 318 U.S. 189, 195, a later decision, the Supreme Court recognized the usefulness of such evidence.

²⁸Neither of the cases cited by appellee bears upon this problem. Both involve the use of subsequent innocent acts to show that the allegedly criminal act was innocent; the use of such evidence is restricted, since the subsequent acts may be innocent only because the defendant was "found out." As pointed out above, the opposite situation exists in the present case.

counsel made another offer, this time of the records up to August, 1949, the date of the indictment (R. 1319). This offer, qualified to meet the prosecution's erroneous arguments for excluding all of 1949 and 1950, was also rejected and serves as a ground for reversal herein. None of appellee's arguments reaches this evidence.

Nor does appellee's second argument have any merit. The evidence was not cumulative. At no time were defendants permitted to introduce any evidence upon the point; the court below chose to admit for the jury's consideration only the comparative years selected by the prosecution (Op. Br. 95).

CONCLUSION.

The judgments of conviction should be reversed.

Dated, San Francisco, California,
January 29, 1954.

Respectfully submitted,
VALENTINE BROOKES,
ARTHUR H. KENT,
PAUL E. ANDERSON,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.



Appendix

EXCERPTS FROM THE OPINION IN GORDON v. UNITED STATES (1953) 344 U.S. 414, 420-421.

“The Court of Appeals affirmed on the ground that Marshall’s admission, on cross-examination, of the implicit contradiction between the documents and his testimony removed the need for resort to the statements and the admission was all the accused were entitled to demand. We cannot agree. We think that an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone’s description and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will emphasize the contradiction to the jury, but because it will best inform them as to the document’s impeaching weight and significance. Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness’ testimony relate not to collateral matters but to the very incrimination of petitioners. Except the testimony of this witness be believed, this conviction probably could not have been had. Yet, his first statement was that he got the film from Swartz; his first four statements did not implicate these petitioners and

his fifth did so only after the judicial admonition we will later consider. The weight to be given Marshall's implication of the petitioners was decisive. Since, so far as we are now informed by the record, we think the statements should have been admitted, we cannot accept the Government's contention based on a premise that the court was free to exclude them. It was error to deny the application for their production."

No. 13,884

IN THE
United States Court of Appeals
For the Ninth Circuit

VAUGHN H. MITCHELL and
DOROTHY MITCHELL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' PETITION FOR REHEARING
and
ALTERNATIVE APPLICATION FOR STAY OF MANDATE.

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Appellants,

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UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California, Southern Division.**

PETITION FOR REHEARING.

*To Hon. William Healy, Hon. William E. Orr, and Hon.
Dal M. Lemmon, Circuit Judges:*

Appellants respectfully petition for rehearing of the cause decided against them on June 7, 1954, on the grounds stated hereafter.

I

The decision is in conflict with that rendered seven days earlier, i.e., on May 31, 1954, by the United States Court of Appeals for the Fifth Circuit, in *Berkovitz v. United States*. The latter decision has not yet been officially re-

ported but may be found in 54-1 USTC par. 9425 (CCH Standard Federal Tax Reports, Vol. 5).

In the *Berkovitz* case a conviction was reversed, the court holding erroneous an instruction on wilfulness which is virtually identical to the one this Court has sustained. The *Berkovitz* case, like the instant case, involved an indictment under Internal Revenue Code Section 145(b). Also like the instant case, the filing of an income tax return understating both the gross and net income was admitted, although the understatement in the *Berkovitz* case greatly exceeded that herein. Again like the instant case, the return was prepared for the defendant by an outside accountant. Finally, the defence was lack of wilful intent, as it was here.

The *Berkovitz* instructions on wilfulness were in two parts, one of which was well stated and more complete than the unexceptionable passages of the instructions herein.¹ Nevertheless, the Court of Appeals held a further part of the instruction, purporting to illustrate the meaning of "wilfulness", to be reversible error. The offending instruction was:

¹The unexceptionable *Berkovitz* passages were:

"Now the word 'wilfully' in the sense used here, denotes often, intentional, knowing, or voluntary, as distinguished from an accidental act, and also employed to characterize the thing done without grounds for believing it lawful or conduct marked by careless disregard of whether one has the right so to act, but, when used in a criminal statute, gentlemen, generally means an act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely."

* * *

"The attempt to defeat and evade the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the government a tax imposed by the income tax laws

“You are instructed that you may find from the facts that the defendant signed his individual income tax returns that he had knowledge of the contents of the return.

“The owner of a business need not be the actual bookkeeper to be familiar with the affairs and finances of that business, but he must be held to know that which it is his duty to know. It is for you to determine from all of the evidence whether the defendant has knowledge of the falsity of this return, provided you also find that the return was false.” (Emphasis supplied by Judge Dawkins.)

The first of these paragraphs, standing alone, might not be objectionable. Its conjunction with the second paragraph is what is harmful, for that converts knowledge of the contents of the return into knowledge of falsity of those contents.

The second of these paragraphs is contained in the instructions given herein. The following is quoted from R. 1945 in this case:

*“Now, of course, the owner of a business * * * need not be the actual bookkeeper to be familiar with the affairs and finances of that business. * * * but he must be held to know that which it is his duty to*

which it was the duty of the defendant to pay to the government. The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendant.”

The unexceptionable passages herein were (R. 1941):

“The attempt must be wilful, that is, intentionally done with the intent that the government should be defrauded of the income tax due from the defendants.”

To this perhaps should be added the unconnected words and phrases collected at p. 9 of Appellee's Brief herein.

know, * * * it is for you to determine from all the evidence whether the defendants had knowledge of the falsity of these returns * * *.”

Comparison will show substantial identity. It is apparent, we believe, that if this instruction is reversible error in the Fifth Circuit and a harmless “peccadillo”² in the Ninth Circuit, there is a fundamental conflict between the circuits.

We considered other errors in the instructions to be more easily demonstrable, and for that reason our briefs were largely devoted to a discussion of those other errors. We shall refer to them subsequently, for we are convinced that the Court’s approval of those other passages likewise conflicts with decisions of other Courts of Appeals, as well as with Supreme Court decisions. At this point, however, we are discussing only the conflict between this decision and the Fifth Circuit case.

In the *Berkovitz* case the court relied on its own prior decision in *Wardlaw v. United States*, (CA 5, 1953) 203 F. 2d 884, 887, where a conviction under Section 145(b) was reversed because the following instruction was given:

“The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be if a person consciously, knowingly, or intentionally did not set up his income and thereby the government was cheated or defrauded of taxes, that he intended to defeat the tax.”

Portions of the instructions herein have the same meaning, though different words are used. Thus (R. 1941-1942):

²The word is a quotation from the opinion of this Court in the instant case.

“* * * a man may not shut his eyes to obvious facts and say he does not know * * *. He must exercise such intelligence as he has, * * *.”

Again (R. 1945):

“* * * he must be held to know that which it is his duty to know and which he solemnly promulgated.”

These excerpts are part of paragraphs which, when read in full, do not soften their harmful impact. They are set out in full at pp. 35-36, Appellants' Opening Brief.

Accordingly, a rehearing should be granted in order that the Court may determine whether it wishes to adhere to its decision in the light of the conflict with the Fifth Circuit. We suggest that the full court may wish to consider whether this conflict should be developed.

II

The decision is likewise in conflict with *Lurding v. United States*, (CA 6, 1950) 179 F. 2d 419, a case reversing a conviction under Section 145(b) for two prejudicial errors, one of which was the giving of the following instruction:

“It is immaterial that the return may have been made out by another person or that some other person may have assisted in the making of the return. When a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return.”

The court stated (179 F. 2d at 421) that this instruction was wrong because it drew the doctrine of *respondent*

superior from the law of negligence and applied it to criminal law where wilfulness, not negligence, is the essential ingredient of the offence.

The instruction approved herein does precisely what the *Lurding* case held was reversible error. In approving the instruction, this Court has adopted a rule in conflict with that applied in the Sixth Circuit. The accuracy of our assertion that there is an essential conflict will appear from the following quotations from the instructions herein, which establish that they, as did the offending instructions in the *Lurding* case, told the jury that "when a return is signed and filed by a taxpayer it becomes his return and he, in law, is responsible for that return":

"It will present a somewhat startling situation if a defendant charged by law with the duty of filing a return could sign and file a false return made to defraud the Government and escape punishment by disclaiming knowledge of that which he had sponsored. * * * *he must be held to know that which it is his duty to know and which he solemnly promulgated, * * **

"The duty to file an income tax return is personal. It cannot be delegated to anyone. * * * no man who is able to read and to write and who signs a tax return is able to escape the responsibility of at least good faith *and ordinary diligence* as to the correctness of the statement which he signs, whether prepared by him or prepared by somebody else." (R. 1945; emphasis ours.)

It is apparent, we submit, that the instructions in the *Lurding* case are merely shorter and more blunt than those herein; they have the same meaning. Again we suggest

that the Court might conclude, if it decides to create this conflict with the Sixth Circuit, that such a decision should be made only by the full court.

III

The *Berkovitz* and *Lurding* cases are supported by the weight of authority, whereas we have found no opinion which states its support for the instructions this Court has just upheld.

In addition to the cases cited from the Fifth and Sixth Circuits, the Third Circuit in *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. sub nom. *U. S. v. Martell*, 345 U.S. 917, the Tenth Circuit in *Haigler v. United States*, (CA 10, 1949) 172 F. 2d 986, and the Supreme Court in *United States v. Murdock*, (1933) 290 U.S. 389, in *Spies v. United States*, (1943) 317 U.S. 364, and in *Screws v. United States*, (1945) 325 U.S. 91, have all adopted the view that no offence is committed under Section 145(b) unless the act is done with "a bad purpose". Furthermore, *Hargrove v. United States*, (CA 5, 1933) 67 F. 2d 820, one of our principal points of reliance herein which like the *Berkovitz* case is a Fifth Circuit decision, has been cited by the Supreme Court as authoritative. *Screws v. United States*, (1945) 325 U.S. 91, 101.

In *United States v. Ragen*, (1942) 314 U.S. 513, 524, the Supreme Court said that Section 145(b) required "acts of bad faith", and "on no construction can (it) become a trap for those who act in good faith." The instruction here, however, required more than good faith as a defence; it required "at least good faith and ordinary diligence."

In *United States v. Murdock*, (1933) 290 U.S. 389, 394, the Supreme Court held that wilfulness in Section 145(b) means "an act done with a bad purpose." The instruction here, however, charged that where the return was prepared by someone other than the taxpayer, the latter could not "escape punishment by disclaiming knowledge of that which he had sponsored. * * * he must be held to know that which it is his duty to know and which he solemnly promulgated." (R. 1945.) The *Berkovitz* case held that some of this very language was inconsistent with the requirement of "a bad purpose." The opinion this Court filed herein makes no attempt to argue otherwise.

Finally, in *United States v. Martell*, (CA 3, 1952) 199 F. 2d 670, cert. den. sub nom. *U. S. v. Martell*, 345 U. S. 917, an instruction which did specifically require "a bad purpose" was held error because it was so confusing that the jury might well have lost sight of that requirement in the welter of contradictory remarks. The appellate court specifically stated that "inadvertent error" was not enough to convict. The defence in the instant case was one of inadvertent error, and yet the instructions herein left the jury free to convict even if it were satisfied that the error was not intentional. The opinion the Court has filed herein makes no attempt to argue otherwise.

A rehearing should be granted so that the Court may enter a decision consistent with the weight of authority.

IV

The decision conflicts in principle with *Brink v. United States*, (CA 6, 1945) 148 F. 2d 325, 328, *Spies v. United*

States, (1943) 317 U.S. 492, and *Spurr v. United States*, (1899) 174 U.S. 728, in approving an instruction which erroneously (1) permitted a conviction under Section 145(a), on which the statute had run when appellants were indicted under Section 145(b), and (2) did so without informing the jury that Section 145(a) requires "willful" misconduct. The opinion filed does not attempt to argue otherwise or to explain why appellants' contention was rejected.

With all deference, we suggest that litigants are entitled to some statement of the reasoning which causes their contentions to be rejected, particularly with respect to a contention which found favor with one of the judges at the oral argument. This contention did so.

The Court will recall that one of the judges informed government counsel that he considered it error to have included in the instructions the paragraph involved in this contention (R. 1952; see Appellants' Opening Brief, pp. 48-51), and asked him to address himself to the point. Counsel's principal reply, as we recall it, was that that paragraph must be read in the context of the entire instructions, to which the judge remarked that a juror arguing for conviction would take it out of context to support his arguments.

We were impressed that the judge's reaction to the government's point is supported by *Bollenbach v. United States*, (1946) 326 U.S. 607, 613-614, where the Supreme Court held that a good passage will not cancel out a bad one, since jurors cannot be expected to know which is

which. Moreover, this instruction stood alone. There was no relevant context to soften, explain or contradict it.

In these circumstances, we are amazed to learn that no member of the Court now thinks the point valid or even worthy of discussion. In these circumstances at least, the litigants should be told why the contention is rejected.

We believe the point is valid. We believe the judge's first reaction to it was correct. We submit that a rehearing should be granted to permit reexamination of the point.

V

The decision conflicts with *Fryer v. United States*, (CA D.C., 1953) 207 F. 2d 134, cert. den. sub nom. *U. S. v. Fryer*, 74 S.Ct. 135, rehearing den. 74 S.Ct. 305, and with *Gordon v. United States*, (1953) 344 U.S. 414. The first of these cases held that defence inspection of written statements given to the government by its witnesses was a matter of right where the statements were not shown to be inconsistent with their testimony, under Criminal Rule 17(c), and the latter case applied the rule to demands for inspection made for the first time during the trial.

Here such demands, made during the trial, were denied. In the cases of Mrs. Cowart and Mrs. Pierson this erroneous denial was particularly harmful to the defence, because they were key government witnesses.

The Court's opinion does not disclose why it did not apply these decisions here. In fact, this point may be one referred to as a "peccadillo". If so, we are certain the Court has not fully grasped the extent to which the

Gordon and *Fryer* cases require reexamination of earlier decisions. If, on the other hand, the Court's belief is that it should follow its earlier decisions, notwithstanding their apparent disapproval in the *Gordon* case (see Appellants' Reply Brief, p. 15), we suggest that belief should be expressly stated in order that the Court's position may be understood.

VI

The opinion indicates that the Court has misconceived the bases of our objection to the restrictions on the cross-examination of Mrs. Cowart. The opinion deals with it entirely as a question of restricting the use of leading questions. On this point, as our reply brief states (p. 8), the only federal case heretofore in point was *Arnette v. United States*, (C.A. 4, 1946) 158 F. 2d 11. Accordingly, in upholding the trial judge on this aspect of the case, the Court appears to have created a conflict between the circuits.

The leading question aspect of the point was not, however, our principal complaint. Other restrictions—those on the *scope* of cross-examination, rather than its manner—were more harmful and were erroneous. The Court's opinion mentions none of these other objections, and the decision rejecting them conflicts with decisions in other circuits as well as with *Alford v. United States*, (1931) 282 U.S. 687. There are several points of conflict.

Each of these restrictions arose on re-cross. On cross, the defence had succeeded in weakening Mrs. Cowart's adverse testimony and in eliciting some favorable testimony, to the effect that Mrs. Cowart had been told by

Mrs. Mitchell in or before 1947 that the money to be delivered to the latter was to be used to buy a home (R. 795, 797). On redirect, the government read to the jury numerous passages from the witness' grand jury testimony in order to develop an apparent conflict between that testimony and her testimony on cross (R. 816-822). On re-cross, the defence sought to remove the implication of conflict and also to weaken the effect of the grand jury testimony itself, and ran into a series of restrictions. We shall demonstrate how the decision upholding those restrictions conflicts with other decisions.

One. Alford v. United States, (1931) 282 U.S. 687, reversed this Court for approving a restriction on cross-examination which prevented the defence from going into the possible bias of a prosecution witness, attributable to intimidation by the prosecution. The Court, it appears to us, has done this very thing again in this case. Mrs. Cowart had testified on cross that Government agents had told her she had the choice of cooperating or being indicted herself. (R. 806, 809-810.) When the defence sought to show that her grand jury testimony read to the jury by the prosecutor on redirect had been given after she had been informed of that "choice", the trial judge prevented it. Defence counsel explained his purpose was to show "intimidation", but was told "no more speeches." (R. 833.) Counsel conformed to the ruling and shifted his re-cross to other matters. (R. 833-834.) Under the *Alford* case this line of inquiry should not have been restricted. *Sandroff v. United States*, (CA 6, 1946) 158 F. 2d 623, also supports us.

Two. In the *Alford* case, the Supreme Court said (282 U.S. at 692):

“It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting * * *.*” (Emphasis ours.)

Consistently with the right that language appeared to give him,³ defence counsel sought to show that when Mrs. Cowart gave that grand jury testimony she had been distraught with worry over her husband’s illness (he died from cancer during the trial), and also that her testimony before the grand jury had not been cross-examined. He was denied the right to develop either point. (R. 827; R. 824-826.) Accordingly, he was not permitted to place the grand jury testimony in its proper setting, contrary to the *Alford* case.

The recross begins at R. 823, and the restrictions placed on defence counsel’s efforts to cross-examine about the setting and circumstances in which Mrs. Cowart gave the grand jury testimony begin on the very next page, R. 824. The recross on this point was restricted in this line of inquiry in every direction it took. (R. 824-834.) Mrs. Cowart was one of the principal prosecution witnesses, so restrictions *in limine* on cross-examination designed to place her grand jury testimony, which the prosecutor had read to the trial jury, in its setting, were prejudicial error.

³Earlier in the opinion the Supreme Court had said (282 U.S. 691): “Cross-examination of a witness is a matter of right.”

United States v. Cohen, (CA 3, 1947) 163 F. 2d 667; *Dickson v. United States*, (CA 10, 1950) 182 F. 2d 131; *United States v. Augustine*, (CA 3, 1951) 189 F. 2d 587; cf. *Lindsey v. United States*, (CA D.C., 1942) 133 F. 2d 368.

Three:

“Cross-examination is a matter of right. (Citations omitted.) That this right is not limited to such cross-examination which will necessarily tend to discredit the testimony in chief is apparent from the Alford decision.” *U.S. v. Michener*, (CA 3, 1945) 152 F. 2d 880, 884.

Yet, in spite of this rule, this Court has upheld the trial judge's action in denying defendant the right on recross to rehabilitate helpful testimony of Mrs. Cowart which had been shaken by the government's use of the grand jury transcript in such manner as to create the impression that that favorable testimony was contrary to what she had told the grand jury. Defence counsel was trying to show that she had given that same testimony to the grand jury. (R. 829-831, 835.) This is directly analogous to the restriction which brought a reversal in the *Michener* case. Thus the decision herein on this point is contrary to the *Michener* decision and, if that case is right, to the *Alford* case as well.

The Court has indicated in its opinion that all restrictions on cross-examination are within the discretion of the trial judge. If the Court meant that these restrictions were within the discretion of the trial judge to impose, its view conflicts specifically with *Lindsey v. United States*, (CA D.C., 1942) 133 F. 2d 368, and generally with *Alford*

v. United States, supra, and *District of Columbia v. Clawans*, (1937) 300 U.S. 617, 632. In the *Lindsey* case the court held that the oft-repeated statement about the conduct of cross-examination being within the discretion of the trial judge relates to "conduct * * * unfair to a witness, undue inquiry into collateral matters to test credibility, and the like," but this discretion does not relate to *scope*. 133 F. 2d at 369. Likewise, in the *Alford* case the Supreme Court said (the emphasis in the following quotation is from the opinion of the Court of Appeals in the *Lindsey* case):

"The *extent* of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. *It may exercise a reasonable judgment in determining when the subject is exhausted, * * *. The trial court cut off in limine all inquiry on a subject with respect to which the defence was entitled to a reasonable examination. This was an abuse of discretion and prejudicial error.*" 282 U.S. 687, 694.

Similarly, in *District of Columbia v. Clawans*, (1937) 300 U.S. 617, 632, where reversal by the appellate court was affirmed, the Supreme Court said:

"The extent of cross-examination rests in the sound discretion of the trial judge. Reasonable restriction of undue cross-examination, and the more rigorous exclusion of questions irrelevant to the substantial issues of the case, and of slight bearing on the bias and credibility of the witnesses, are not reversible errors. But the prevention, throughout the trial of a criminal case, of all inquiry in fields where cross-examination is appropriate, * * * passes the proper

limits of discretion and is prejudicial error. See *Alford v. United States*, supra.”

We cannot possibly disagree with the statement in this Court’s opinion that “The object of examination is to get the facts.” We suggest, however, that defence counsel was seeking to do that very thing and the trial judge’s ruling restricted his doing so. We believe this point escaped the Court’s attention and it believed, incorrectly, that the only issue before it was the form of the questions.

A rehearing should be granted.

VIII

(a) The discussion in the opinion devoted to the *res judicata* point does not answer the contention we made. We refer to page 10 of the slip opinion. The instruction given did not “frustrate the appellee’s strategy completely” or at all. The instruction given includes damaging portions not quoted in the opinion, portions which instructed the jury entirely in line with appellee’s strategy.

The instructions informed the jury that the evidence of understatements in the years before 1947 had been admitted “under the rule that acts similar to those charged in the indictment can be proved to show intent when they are sufficiently near * * * and of the same general nature as the transactions out of which the alleged criminal act arose.” (R. 1944.) This instruction, standing alone, left the jury free to speculate whether the understatements in 1942-1946 showed an intent to evade, and free to decide on the evidence before this jury that the Doctor was

guilty in the years 1942-1946 of a pattern of unlawful conduct which continued into 1947.

Under established principles of *res judicata*, the jury was not entitled to speculate about the Doctor's intent in 1942-1946. The jury was bound by his prior acquittal. It should have been informed that it *must* consider Dr. Mitchell innocent of unlawful intent in 1942 to 1946. Instead it was told *neither* his guilt nor his innocence on the previous trial for the years 1942-1946 was to be considered. The instruction added, "nor are you to consider for any purpose whatsoever the result of any previous trial." (R. 1938-1939.)

Undoubtedly, the jury knew of the prior acquittal. This, though, is not all the law requires. The law requires that nothing be permitted to undermine it in the jury's eyes. In view of the evidence introduced by the prosecution, and the prosecutor's argument to the jury, the instructions given were inadequate to insure that the jury would not convict for 1947 because they thought the defendant guilty for 1942-1946.

(b) The panel which decided this case appears to have erected an additional barrier to the application of Rule 52(b) to erroneous instructions. The opinion cites Rule 18(2)(d) of the rules of this Court as a barrier in this particular case because we failed to set out in our Specifications of Error "the grounds of the objection urged at the trial." No objection was urged at the trial, so there were none we could set forth. Accordingly, the opinion states, we failed to comply with the rules of this Court and

therefore consideration under Rule 52(b) of the Rules of Criminal Procedure is foreclosed.

This means that in no case where Rule 30 has not been complied with can Rule 18(2)(d) of the rules of this Court be complied with, resulting in a situation where Rule 52(b) will never be applied by this panel to erroneous instructions, except possibly *sua sponte*.

Counsel practicing in this Court are now faced with an impossible situation whenever the present problem is presented. Apparently this particular panel refuses any longer to follow *Samuel et al. v. United States*, (CA 9, 1948) 169 F. 2d 787, where the court sat *en banc* in order to lay down a rule for this circuit. In *Kobey et al. v. United States*, (Nov. 30, 1953) 208 F. 2d 583, 587-589, a three-judge panel of this Court departed from the *Samuel* rule. However, in *Schino et al. v. United States*, (Dec. 2, 1953) 209 F. 2d 67, 74-75, a three-judge panel cited the *Samuel* case as authoritative, and held the assertion of error in an instruction should be considered under Rule 52(b) although there had not been compliance below with Rule 30. Finally, in *Benatar v. United States*, (Jan. 6, 1954) 209 F. 2d 734, 743-745, a three-judge panel, one judge dissenting, held that this Court would apply Rule 52(b) only to "stock" instructions, not to instructions peculiar to the facts of the particular case.

The erroneous instruction in the *Samuel* case was not of "stock" nature, but was an unsuccessful attempt to state the OPA regulations applicable to the facts of that particular case. Those regulations were so complex and

filled with exceptions to all rules that any effort to treat precise instructions concerning them as of "stock" nature would be productive of error in nearly every case. Yet the erroneous instruction was considered under Rule 52(b), and was made a ground of reversal.

Counsel's uncertainty about the rule in this circuit is added to by the fact that one judge participated in each of the foregoing cases and signed the prevailing opinion in each one, although they stated contrary rules.

What, then, is the rule in this circuit? Does it vary from panel to panel? We submit that at present it appears to. That is the precise situation for which Congress designed the "in banc" procedure of 28 U.S. Code Section 46(c). *Textile Mills Securities Corporation v. Commissioner*, (1941) 314 U.S. 326, 335; *Western Pac. R. Corporation v. Western Pac. R. Co.*, (1953) 345 U.S. 247, 260, footn. 20.

Accordingly, we suggest that the full court should determine whether the prior rule adopted by it in *Samuel v. United States*, (1948) 169 F. 2d 787, should be adhered to, or should be abandoned.

The Court may also wish to consider the fact that the instructions considered and held reversible error in *Screws v. United States*, (1945) 325 U.S. 91, 106-107, were not stock instructions but were special-fact situation instructions. See 325 U.S. at 107. Yet the Supreme Court took note of the error *sua sponte* and reversed on account of the erroneous instructions. Likewise, in *Fisher v. United States*, (1946) 328 U.S. 463, 467-470, the Supreme Court considered, *sua sponte*, the possibility that a

stock instruction on premeditation should have been varied for a special-fact situation and concluded that it need not have been. In both cases there had not been compliance with what is now Rule 30.

Accordingly, the Supreme Court will notice such errors *sua sponte*, and presumably it expects this Court to do so as well. This means, then, that the problem is whether this Court wishes counsel not to assist it in the performance of this duty.

We suggest that unless the full court instructs counsel not to do so, in the present state of uncertainty conscientious counsel will feel compelled to call such points to the attention of the Court.

CONCLUSION.

For the foregoing reasons, a rehearing should be granted. We suggest that in view of the conflicts the decision would establish if reaffirmed, the case should be reheard en banc.

San Francisco, California, July 2, 1954.

Respectfully submitted,

VALENTINE BROOKES,

ARTHUR H. KENT,

PAUL E. ANDERSON,

Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I, VALENTINE BROOKES, am the principal author of the attached petition for rehearing, and in such capacity and as counsel for appellants herein, I certify that:

1. In my judgment the attached petition for rehearing is well founded and should be granted; and
2. It is not interposed for delay.

VALENTINE BROOKES.







No. 13,884

IN THE

**United States Court of Appeals
For the Ninth Circuit**

VAUGHN H. MITCHELL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
Northern District of California, Southern Division.**

ALTERNATIVE APPLICATION FOR STAY OF MANDATE.

If a rehearing should not be granted, appellant Dr. Vaughn H. Mitchell intends to petition the Supreme Court for a writ of certiorari. Appellant is now free of custody under bail of \$40,000 fixed by order of this Court (R. 41). In order that appellant may prepare and file the petition for a writ of certiorari, if a rehearing should not be granted by this Court:

Appellant hereby applies for a stay of the mandate of this Court until final decision of this case by the United

States Supreme Court, either on the merits or by a denial of a writ of certiorari.

San Francisco, California, July 2, 1954.

Respectfully submitted,

VALENTINE BROOKES,

ARTHUR H. KENT,

PAUL E. ANDERSON,

Attorneys for Appellant.

No. 13885

United States
Court of Appeals
for the Ninth Circuit

THYS COMPANY, and E. CLEMENS HORST
COMPANY,

Appellants,

vs.

SOPHIE OESTE, an Individual,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 251, inclusive)

Appeal from the United States District Court for the
Northern District of California, Northern Division

FILED

NOV 6 1953

WILLIAM S. O'BRIEN



No. 13885

United States
Court of Appeals
for the Ninth Circuit

THYS COMPANY, and E. CLEMENS HORST
COMPANY,

Appellants,

vs.

SOPHIE OESTE, an Individual,

Appellee.

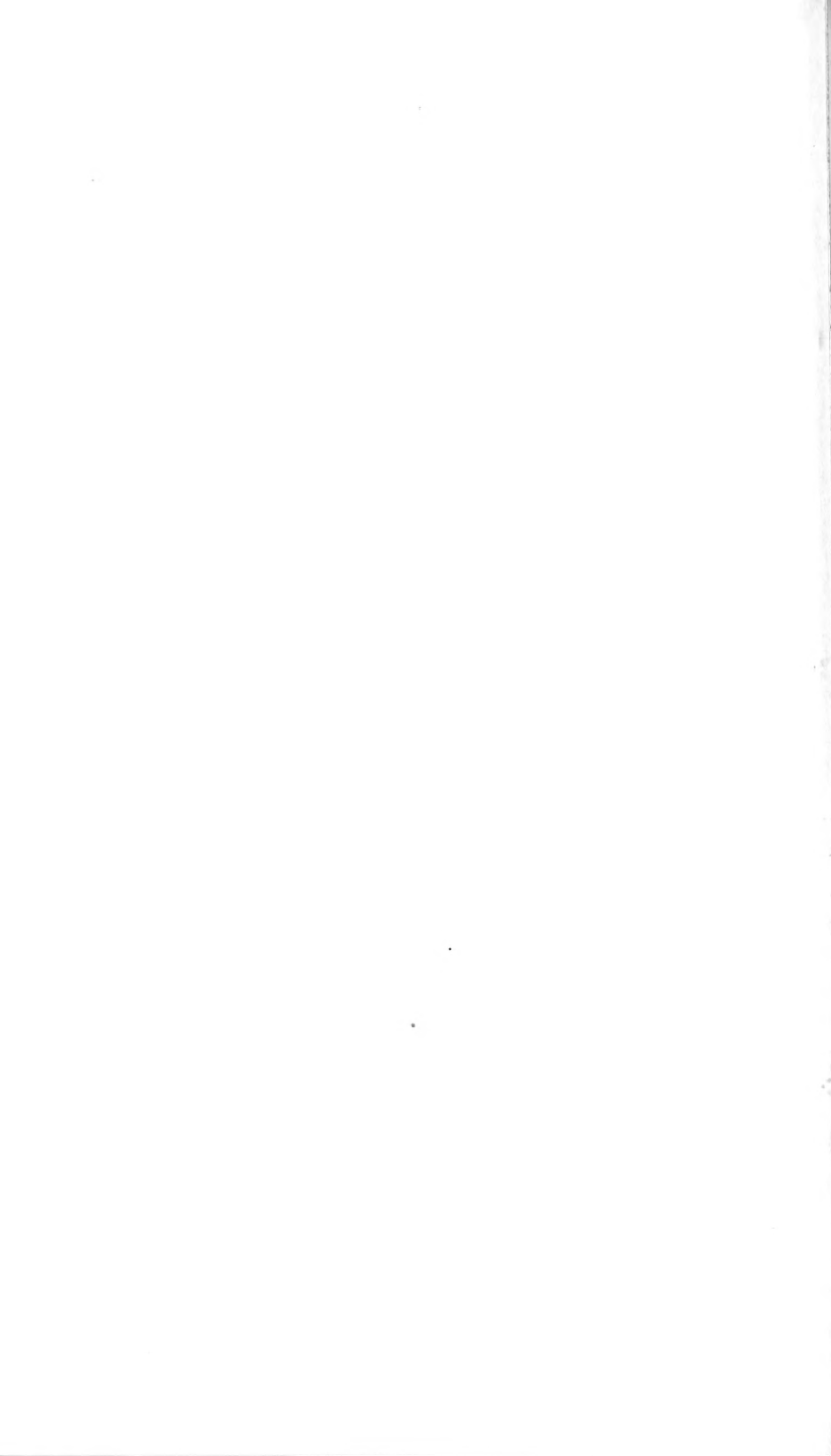
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Northern District of California, Northern Division



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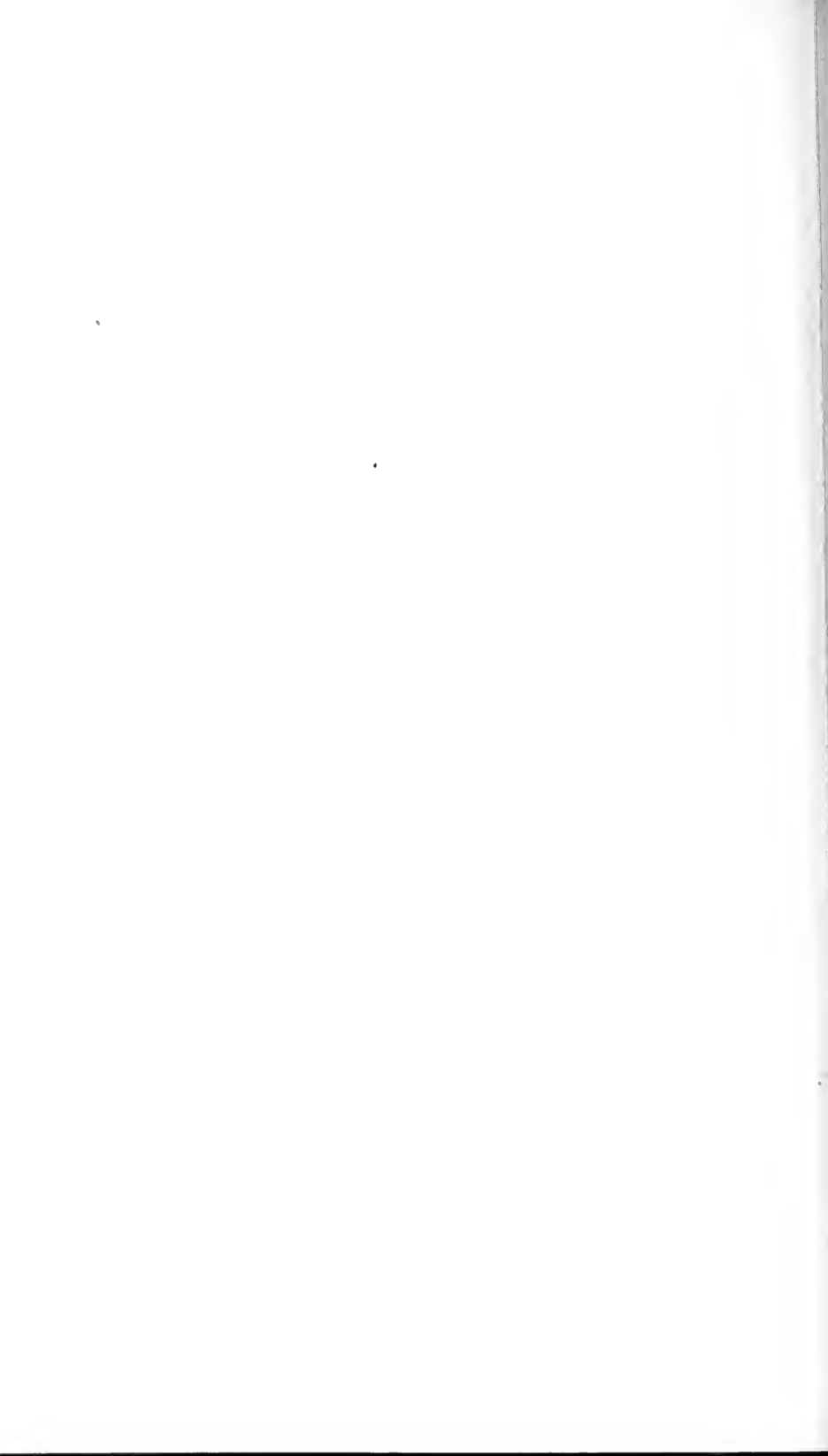
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In the United States District Court, Northern Dis-
trict of California, Northern Division

Civil Action No. 6435

THYS COMPANY, a corporation, and E.
CLEMENS HORST COMPANY a corpora-
tion, Plaintiffs,

vs.

SOPHIE OESTE, an individual,
Defendant.

COMPLAINT

1. The action arises under U. S. Code, Title 28, Section 1338(a) and U. S. Code, Title 35, Sections 67 and 70, as hereinafter more fully appears.

2. On December 24, 1940, United States Letters Patent No. 2,226,009 were duly and legally issued to plaintiff E. Clemens Horst Company, a corporation, for an invention in Hop Separator; and plaintiff E. Clemens Horst Company since that date has been and still is the owner of those Letters Patent.

3. On or about October 18, 1940, Edouard Thys, a resident of Sacramento County, California, entered into an exclusive license agreement with plaintiff E. Clemens Horst Company, whereby said Edouard Thys became the exclusive licensee under certain United States and foreign Letters Patent and applications including application for United States Letters Patent Ser. No. 299,986, for Hop Separator, filed June 20, 1940, and which said application matured on December 24, 1940 as said United States Letters Patent No. 2,226,009. On or about Decem-

ber 30, 1946, said Edouard Thys did assign all his rights, title and interest in said agreement, dated October 18, 1940, to plaintiff Thys Company, a corporation, and plaintiff E. Clemens Horst Company did consent to said assignment, in writing, on or about January 24, 1947, and plaintiff Thys Company, since that date has been and still is the exclusive licensee under said United States Letters Patent No. 2,226,009.

4. Defendant has for a long time last past and still is infringing those Letters Patent No. 2,226,009 by making, selling and using Hop Separators embodying the patented invention and will continue to do so unless enjoined by this Court.

5. Plaintiff Thys Company has placed the required statutory notice on all Hop Separators manufactured, and/or leased, and/or sold by it under said Letters Patent and has given written notice to defendant of her said infringement.

Wherefore, plaintiffs demand a preliminary and final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits and damages, a sum equal to three times the amount of actual damages sustained, by plaintiff, an assessment of costs against defendant, an award of reasonable attorneys' fees, and such other relief as the Court may see fit to award.

/s/ TOWNSEND & TOWNSEND,
Attorneys for Plaintiff

[Endorsed]: Filed December 15, 1950.

[Title of District Court and Cause.]

ANSWER

Comes now the above named defendant and for Answer to the Complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph 1 of said complaint, defendant admits that the action arises under U. S. Code, Title 28, Section 1338(a) and U. S. Code, Title 35, Sections 67 and 70.

II.

For answer to paragraph 2 of said complaint, defendant admits that Letters Patent of the United States, No. 2,226,009, were issued on or about December 24, 1940 to George E. Miller of Sacramento, California, assignor to E. Clemens Horst Company, San Francisco, California, a corporation of New Jersey; denies that said Letters Patent were duly and legally issued to plaintiff E. Clemens Horst Company, a corporation; and denies that plaintiff E. Horst Company, a corporation, ever since December 24, 1940 or at any subsequent time has been and now is the owner of said Letters Patent.

III.

Answering paragraph 3 of said complaint, defendant avers that she has no knowledge of the alleged exclusive license agreement recited in said paragraph 3 between the plaintiff E. Clemens Horst

Company and Edouard Thys of Sacramento, California; avers that she has no knowledge of the recited assignment from Edouard Thys to plaintiff Thys Company; and further avers that she has no knowledge of the recited consent of plaintiff E. Clemens Horst Company to said assignment or any assignment, in writing or otherwise, and therefore denies all and singular the allegations of said paragraph 3 relating to said exclusive license, said assignment and said consent and leaves plaintiffs to make such proof thereof as they may be advised; and denies that plaintiff Thys Company at any time has been and still or now is an exclusive licensee under said United States Letters Patent No. 2,226,009.

IV.

For answer to paragraph 4 of said complaint, defendant denies each and every allegation, all and singular, in said paragraph 4 contained.

V.

Answering paragraph 5 of the complaint on file herein, defendant avers that she has no knowledge of the matters therein set forth and alleged, and therefore denies each and every, all and singular, of the allegations in said paragraph 5 contained.

VI.

Further answering the complaint on file herein, defendant upon information and belief avers that said Letters Patent No. 2,226,009 is invalid and void for the following reasons:

(A) because long prior to the alleged invention by said George E. Miller of the alleged improvement described and claimed in said Letters Patent, or more than two years prior to the date of the application which matured into said Letters Patent, the said alleged improvements, or all material and substantial parts thereof, had been patented or described in printed publications, as follows:

United States Letters Patents

Number	Inventor	Date of Grant
240,889	Compton	May 3, 1881
540,774	Armstrong	June 11, 1895
544,156	Clark	Aug. 6, 1895
555,553	Randolph	Mar. 3, 1896
655,161	Poorbaugh	July 31, 1900
936,162	Pringle	Oct. 5, 1909
1,008,914	Horst	Nov. 14, 1911
1,054,119	Horst	Feb. 25, 1913
1,054,551	Horst	Feb. 25, 1913
1,287,624	Bot	Dec. 18, 1918
1,107,207	Scott	Aug. 11, 1914
1,153,304	Hamacheck	Sept. 14, 1915
1,488,249	Horst	Mar. 25, 1924
1,583,201	Thompson	May 4, 1926
2,115,107	Hoffeld	Apr. 26, 1938
2,138,529	Thys	Nov. 29, 1938

Foreign Letters Patent

(German)

555,267	Buttner	July 19, 1932
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and by and to others whose names and the numbers

of whose patents defendant begs leave to affix hereto, by amendment or otherwise, when defendant has fully ascertained the same;

(B) because long prior to the alleged invention by the said George E. Miller in the alleged improvements described and claimed in Letters Patent No. 2,226,009, the same or all material and substantial parts thereof had been known and used by others in the United States, and particularly by the following, to-wit:

1. By the patentees and assignees of the patents listed in this paragraph VI, sub-paragraph (A); and

2. By others whose names, residences and places of knowledge and use defendant begs leave to affix hereto, by amendments or otherwise, when defendant has fully ascertained the same;

(C) because more than two years prior to the filing of the application which matured into said Letters Patent No. 2,226,009, the alleged invention described and claimed therein had been in public use or on sale within the United States, and particularly by the persons and companies named in the preceding sub-paragraph (B) of this paragraph VI, and by others whose names, residences and places of use and/or sale, defendant begs leave to affix hereto, by amendment or otherwise, when defendant has fully ascertained the same.

VII.

Further answering the complaint on file herein, defendant avers, upon information and belief, that

the alleged improvements of inventions purported to be covered by said Letters Patent No. 2,226,009, and particularly defined in the claims thereof, were devoid of substantial novelty or invention in view of the well known state of the art as shown by the printed publications or patents and the prior use and knowledge by others, as set forth in paragraph VI hereof, as well as by others, as well as by other practices commonly known and used by the public, particularly with respect to previous separator belts, alone, as well as in combination therewith of delivery and take-off conveyors, and did not constitute patentable subject matter of invention or discovery within the meaning of the Patent Laws of the United States, and by reason thereof defendant avers that said Letters Patent No. 2,226,009, and each and every claim thereof, is invalid and void.

VIII.

For further answer to the complaint on file herein, defendant avers upon information and belief that said Letters Patent No. 2,226,009 does not, nor does any claim thereof, disclose, describe or define patentable subject matter within the meaning of the Patent Laws of the United States but on the contrary said Letters Patent sets forth, described and claims only old and familiar means in common knowledge and use long prior to the alleged invention thereof by said George E. Miller which were within the reach of and at the disposal of any person skilled in the art of hop picking machines and separators for hop picking machines desiring to

utilize the same, and further avers that the details of said alleged invention of said Letters Patent represent only ordinary mechanical skill and, therefore, defendant further avers that said Letters Patent No. 2,226,009 is invalid and void.

IX.

Further answering the complaint on file herein, defendant avers upon information and belief that the claims, and each of them, of said Letters Patent No. 2,226,009 are so limited and restricted by the prior art, hereinabove set forth, as well as by the admissions of and action taken by the said George E. Miller and by the plaintiffs in prosecuting the application which matured into said Letters Patent, and by the limitations and restrictions under the requirements of the Commissioner of Patents prior to the allowance of said Letters Patent, and wherefore plaintiffs, and each of them, are estopped to claim or assert broader construction for such alleged invention than the specific combinations of specified elements as arranged in the manner set forth and defined in the claims, and each of them of said Letters Patent.

X.

For further answer to the complaint on file herein, defendant avers that said Letters Patent No. 2,226,009 is invalid and void as to each and every claim thereof because said claims define unpatentable aggregations as distinguished from patentable combinations.

XI.

For further answer to the complaint on file herein, defendant avers that the claims, and each of them, of said Letters Patent No. 2,226,009 are invalid and void because the making of the alleged inventions therein set forth did not involve the inventive faculty; because the alleged inventions therein set forth are merely expedients such as have been used theretofore in various forms of mechanical arts and otherwise; because the adaptation of such expedients to hop picking machines or to hop separators was nothing more than ordinary mechanical skill; because the alleged inventions therein set forth amount to but the utilization of well-known properties of a well-known material and the achievement of no unexpected result or results; and because the alleged inventions therein set forth amount to no more than the substitution of one well-known material for another well-known material in an old and exhausted combination or association of elements employed in the material separator and material grader arts long prior to the alleged inventions of said Letters Patent No. 2,226,009.

XII.

Further answering the complaint on file herein, defendant avers that said Letters Patent No. 2,226,009 and every part and claim thereof are invalid and void for want of patentable novelty and because the claims thereof are broader than the alleged invention disclosed; because the claimed combinations are, and each of them is, old in the art or related

or analogous arts; and because said George E. Miller, the applicant named in the application which matured into said Letters Patent No. 2,226,009 has claimed in said Letters Patent more than said applicant invented if any invention is therein disclosed.

Wherefore, defendant prays:

1. That this Honorable Court adjudge and decree that said Letters Patent No. 2,226,009 is invalid and void as to each and every claim thereof;

2. That this Honorable Court adjudge and decree that even if said Letters Patent No. 2,226,009 be valid the defendant herein has not infringed said Letters Patent nor any claim or claims thereof;

3. That this Honorable Court enter its judgment herein dismissing the complaint on file herein and this action, and awarding the defendant her costs and expenses herein incurred; and

4. That this Honorable Court grant defendant such other and further relief as to it may seem meet and just in the premises.

/s/ C. K. CURTWRIGHT,

/s/ JULIUS KELLER,

/s/ WHITE & WHITE,

Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed April 17, 1951.

[Title of District Court and Cause.]

MEMORANDUM

Ecclesiastes tells us that men "have sought out many inventions". Consequently—to paraphrase the same Preacher—of making many patents there is no end.

Frequently, however, patents have been improvidently granted. In the words of Mr. Justice Douglas, "The Patent Office, like most administrative agencies, has looked with favor on the opportunity which the exercise of discretion affords to expand its own jurisdiction. And so it has placed a host of gadgets under the armour of patents—gadgets that obviously have had no place in the constitutional scheme of advancing scientific knowledge."¹

Of such a jejune type is the patent in suit.

1. The Complaint:

The complaint was filed on December 15, 1950. It alleged that on December 24, 1940, United States Letters Patent No. 2,226,009 were issued to the plaintiff Horst Company "for an invention in Hop Separator", and that the Horst Company is still the owner of the patent. Other allegations were:

On October 18, 1940, Edouard Thys entered into an exclusive license agreement with the Horst Company, whereby Thys became the exclusive licensee

¹Concurring opinion in *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, 340 U.S. 147, 156 (1950).

under "certain United States and foreign Letters Patent and applications, including Application * * * Ser. No. 299,986, for Hop Separator, filed June 20, 1940, and which said application matured" as the patent in suit, No. 2,226,009, hereinafter referred to as "the patent".

On or about December 30, 1946, Thys assigned his title to the agreement to the plaintiff Thys Company, and the plaintiff Horst Company consented to the assignment on or about January 24, 1947, since which latter date the Thys Company has been the exclusive licensee under the patent.

The defendant has been infringing the patent "for a long time last past" and will continue to do so unless enjoined by this Court. The plaintiff Thys Company has placed the required statutory notice on all Hop Separators manufactured, "and/or leased, and/or sold by it" under the patent, and has given written notice to the defendant of her infringement.

The complaint closes with a demand for a preliminary and final injunction, for an accounting for profits and damages, a sum equal to three times the amount of actual damages, etc.

2. The Answer:

After divers proceedings not here relevant, on April 17, 1951, the defendant filed her answer. She denied the validity of the patent, on the ground that more than two years prior to the date of the application therefor, "the said alleged improvements, or all material and substantial parts thereof, had been patented or described in printed publications".

The answer lists sixteen prior domestic patents and one foreign patent, and also asserts prior public use or offer for sale of the "alleged improvements" by the patentees and assignees of the seventeen patents, and by others.

It is also averred that the alleged improvements or inventions "purported to be covered" by the patent were devoid of substantial novelty or invention because of the prior art, as shown by printed publications or patents, "the prior use and knowledge by others," etc., "particular(ly) with respect to pervious separator belts, alone, as well as in combination therewith of delivery and take-off conveyors," etc. The defendant asserts that the claims define "unpatentable aggregations as distinguished from patentable combinations".

The answer further alleges that the patent describes and claims "only old and familiar means in common knowledge and use long prior to the alleged invention thereof by * * * George E. Miller (the assignor of the patent to the Horst Company), which were within the reach of and at the disposal of any person skilled in the art," etc.

File wrapper estoppel is also pleaded, and infringement is denied.

On April 22, 1952, the defendant filed a "Notice of Additional Defenses", listing five additional patents "as evidence of previous invention, knowledge, or use of the thing patented," etc.

3. The Motion to Dismiss:

At the close of the plaintiffs' case in chief, the defendant made an oral motion to dismiss, on the

grounds that "the disclosure of this patent is indefinite, incomplete, not clear, and not in accordance or in conformity with Revised Statute(s) 4888 or 35 USCA 33". The Court deferred a ruling on the motion until the conclusion of the case.

Since the Court is disposing of this litigation on a broader ground, a ruling on the motion to dismiss is not necessary.

4. The Patent:

Three claims are contained in the patent in suit. They are set out in the margin.²

²"1. In a machine for separating hops from leaves, stems and other foreign material, a pair of spaced endless sprocket chains, upper and lower pairs of sprocket gears to support the chains, cross-bars connecting the chains, a pervious separator belt composed of netting material woven from textile cords supported by the cross-bars, cross-slats disposed on top of the netting material and securing said material to the cross-bars, said net and the chains supporting the same being disposed on an incline, means for imparting continuous movement to the belt in a direction to cause it to travel up the incline, means for maintaining a continuous flow of air through the netting material, and means for depositing hops, leaves and stems on the netting material at a point adjacent the upper end, the mesh in said netting material being slightly smaller than the hops to be separated, to permit the hops to roll down the inclined surface presented by the netting material, the mesh in said netting, and the cross-slats; retaining the leaves and large stems but permitting smaller stems to fall through the mesh of the netting material.

"2. In a machine for separating hops from leaves, stems and other foreign material, a pair of spaced endless sprocket chains, upper and lower

At the outset, it may be well to consider some generalizations indulged in by the plaintiffs with regard to their patent.

pairs of sprocket gears to support the chains, cross-bars connecting the chains, a pervious separator belt composed of netting material woven from textile cords supported by the cross-bars, knots formed at the points where the cords intersect each other to form meshes of the netting material, cross-slats disposed on top of the netting material and securing said material to the cross-bars, said net and the chains supporting the same being disposed on an incline, means for imparting continuous movement to the belt in a direction to cause it to travel up the incline, means for maintaining a continuous flow of air through the netting material, and means for depositing hops, leaves and stems on the netting material at a point adjacent the upper end, the mesh in said netting material being slightly smaller than the hops to be separated, to permit the hops to roll down the inclined surface presented by the netting material, the mesh in said netting, the knots formed at the intersection of the meshes, and the cross-slats, retaining the leaves and large stems but permitting smaller stems to fall through the mesh of the netting material.

“3. In a machine for separating picked hops from leaves, stems and other foreign material, a pervious separator belt composed of textile netting material having a diamond-shaped mesh slightly smaller than the size of the hops to be separated, means for disposing the belt on a sufficiently steep incline to cause hops deposited on the surface of the belt adjacent the upper end thereof to roll down the incline and off the belt, means for imparting continuous movement to the belt in a direction opposite to the rolling hops, and means for maintaining a continuous flow of air through the belt with sufficient velocity to cause leaves and the like to adhere thereto.”

In the first place, they assert that the “citation of so many prior art patents (supra) in and of itself, is evidence that there is no substance to Mrs. Oeste’s argument that Miller (sic) combination did not require invention”. This seems to be a non sequitur on the plaintiffs’ part; for the classical purpose of citing prior art is to show lack of invention in the patent in suit. If the prior art cited is not relevant, a criticism of this type might be appropriate; but the mere citation of earlier patents is not, “in and of itself”, evidence of any weakness in an alleged infringer’s argument.

Furthermore, in describing their machine, the plaintiffs indulge in considerable hyperbole. It is scarcely appropriate to refer to what is admittedly a “combination patent”—even were it meritorious—as representing “a high degree of invention”. Similarly, this Court cannot agree that “this is one of the few cases which has (sic) come before this Court in which the patent in suit could be said to meet all of the affirmative tests of invention which have been announced by the Courts”. Nor is there factual justification in the record for the statement that “The Miller Combination Has Produced Surprising New Results”.

Again, some of the assertions contained in the testimony adduced by the plaintiffs are palpably immoderate—such as the statement by the witness Wisseman that comparing his “original” machine with the “fishnet separator” of the patent in suit “would be somewhat like comparing a wheelbarrow to a Cadillac”!

Finally, somewhat intemperate is counsel's criticism of William A. Doble, the defendant's expert witness. When Mr. Doble took the stand, one of the attorneys for the plaintiffs stipulated to his qualifications "absolutely", declaring that "there is no question about qualifying Mr. Doble as an expert witness". Yet in their reply brief counsel assert that "The Defendant's Expert Is Not Credible" that his "capacity and experience is (sic) that of an advocate on the stand rather than that of a fact witness"; and that "His testimony is entitled to no more weight than the argument of counsel" (Emphasis supplied.) The Court does not believe that these strictures upon Mr. Doble's "capacity" and "experience" are warranted.

Each Component of the Combination Is Old:

The elements of this combination patent are old. The plaintiffs do not only admit this: they insist upon it. For example, their counsel declared—somewhat tautologically perhaps—that every element of the patent was "old and ancient", or "infinitely old". Indeed, counsel tried to lead Doble to say that the fishnet was used in ancient days—yea, verily, even unto "Biblical times". So vehement, as a matter of fact, has been the emphasis upon the almost paleozoic antiquity of this implement, that a reader of the record would be only mildly surprised to learn of a fishnet buried in the primordial ooze—dropped there by a discouraged Pithecanthropus!

Despite these emphatic disclaimers of any novelty inherent in a fishnet, however, Miller, the assignor

of the patent in suit, insisted on the stand "that a belt made of netting—a pervious belt of netting had never been used before and is entirely new." Miller added:

"The material used in manufacturing this belt is old, of course, but the formation of it into a separating belt was an entirely new idea, had never been used, and proved successful."

Elsewhere in his testimony, Miller repeated that assertion. He testified that the only difference in his patent is that the "inclined plane" is built of "different material"; and that "the mesh constructed for the separating purposes"—"that is the invention".

Nevertheless, in the specifications that form part of the patent, Miller stated:

"While good results have been obtained with netting material made both from wire and from textile cord, that is, cord similar to so-called 'fish line', or that used in the manufacture of fish nets, the fish-net type of pervious belt seems to give the best results; and while this and other features of my invention have been described and illustrated in more or less specific form, I nevertheless wish it understood that changes may be resorted to within the scope of the appended claims." (Page 3, col. 1, lines 20-30 of the patent.)

On cross-examination, when Miller was questioned regarding the concession in the patent that "good results have been obtained with netting material made both from wire and from textile cord", he

pointed out that he "didn't patent the metal belt", but "The fishnet belt".

While it is true that the claims themselves specify that the separator belt shall be made of textile netting material, the concession in the specifications that "good results have been obtained" with wire netting throws some light upon the plaintiffs' extravagant claims of "surprising new results".

Claim 2 of the patent differs from the other two claims in that it calls for "knots formed at the points where the cords intersect each other to form the meshes of the netting material," etc. Doble testified that "The knots projecting above the net would tend to cause material to adhere to the surface of the net," but that this is "obvious" and "Inherent in the fishnet itself".

5. The Parade of Prior Patents:

The mesh of the separator belt, then, is the claimed "invention".

Let us see just how much patentable novelty the plaintiffs have caught in their fishnet. A glance at the prior art gives the answer.

(a) Scott, No. 1,107,207, August 11, 1914:

The device was designed for hulling peas and beans. There was specified "a special screening surface for the body of the separating drum 24. This consists of a pliable netting of fibrous strands such as the cord netting, shown in Fig. 5. I may make use of an ordinary seine or fish net, but in order to make use of a heavier thread I prefer to make a net by using large sized cord crossed at suitable in-

tervals to form the correct size or opening and staple the cords together instead of knotting them." (Emphasis supplied.)

Miller admitted that fishnets have knots at the intersections of the cords to form the meshes, but added, not very luminously, "they are just knots because they happen to be there".

Doble testified that the pervious separating belt shown in Scott performs the same function in the Miller patent that it does in the Scott patent.

(b) Horst, No. 1,488,249, March 25, 1924:

This patent teaches an "incline or surface down which the hops are permitted to roll during the separating operation" and overlapping slats 7 that "may be covered with canvas or the like to present a roughened or adhesive surface for the leaves, petals, etc., to be collected thereon".

This Horst patent was declared invalid by this Court in *E. Clemens Horst Co. vs. Gibbens & Blodgett*, DC Cal., 50 F. Supp. 607, 608 (1943). Language used in that case is apposite here:

"The claim of the separator patent is, in my opinion, invalid for want of novelty and invention in view of the state of the art at the time of the issuance of the (patent), as disclosed by the teachings and drawings of the expired patent to Horst, No. 1,054,119, * * *

"If invention were to be found in that part of the combination claim of the separator patent relating to the structure of the separating belt, the patent would still be invalid as claiming (as

here) more than the patentee invented. The claim of the separator patent did not cover the separating belt alone. The separating belt was one of a combination of elements none of which performed any new or different function in the claimed combination over that performed by these same elements as shown in combination in the expired patent to Horst, No. 1,054,119. I consider the principle of *Lincoln Engineering Co. of Illinois vs. Stewart-Warner Corporation*, 303 U.S. 545, 58 S.Ct. 662, 82 L. Ed. 1008, controlling here". (Emphasis supplied.)

(c) Thompson, No. 1,583,201, May 4, 1926:

This patent was for grading fruits, vegetables, coal, ores, and the like. In the specifications, it was described as used for grading potatoes. The machine contained two endless "sorting chains", each having a different-sized mesh from the other. A hopper directed the potatoes upon the first sorting chain. The potatoes, called "seconds", that passed through the chain of "larger mesh" were conveyed to the second sorting chain, of smaller mesh. The potatoes that were retained on the first, or larger-meshed chain, were conveyed into a bag. In other words, the larger-meshed chain retained the larger potatoes, and the smaller-meshed chain, the smaller potatoes. "The very small potatoes of no commercial value and the dirt and clods pass through the second sorting chain 25 to the ground."

The Thompson patent and the Scott patent, *supra*, both figured in the disallowance of two of Miller's

claims in the Patent Office. These file-wrapper matters will be discussed *infra*.

(d) Hoffeld, No. 2,115,107, April 26, 1938:

Along with the Thys patent, *infra*, this Hoffeld disclosure is the "closest representation" of the plaintiffs' device, according to Doble.

This invention is of an apparatus for the silking and the cleaning of corn. Its teaching includes a "screen" or "open mesh" "conveyor member" supported on sprockets.

Regarding this "separator belt", Doble explained:

"That is not a textile belt in the sense that it is not a fishnet; it is made of metallic strips, but it serves the same function, to separate the kernels of the corn from small pieces of the cob and the silk of the corn."

Testifying with regard to Claim 3 of the patent in suit, which, *inter alia*, provides "for disposing the belt on a sufficiently steep incline to cause hops deposited on the surface of the belt adjacent the upper end thereof to roll down the incline and off the belt," the defendant's expert continued, referring to Hoffeld's "conveyor member":

"Yes, it performs the same function exactly. As shown in Fig 5, the elements to be separated are deposited from a hopper to the upper end of the inclined belt 3 and the corn which is to be saved rolls down the belt and is finally received in the hopper below the lower end of the belt, while the corn silk, corn husk parts and other foreign material are conveyed upwardly by the belt over the top pulley and deposited to the rear of the conveyor or separator belt."

(e) Thys, No. 2,138,529, November 29, 1938:

Like the patent in suit, the Thys device is a "hop separator". He, too, teaches "an endless pervious belt disposed at an inclination". "This belt," Thys says in his specifications, "may be constructed of a coarse fabric, or a comparatively closely woven wire, or like material".

Testifying in the present suit, Thys said that Fig. 2 of his patent, which is an enlarged perspective view of a portion of the separator belt, showed a wire mesh. Under further questioning, however, he admitted that the figure "possibly could" show a "coarse fabric belt", but added that such a belt was not what he "had in mind".

Thys finally admitted that, in his patent, he was attempting to claim both a wire belt similar to Fig. 2 shown therein, and a coarse fabric belt similar to that same figure. As a matter of fact, there is no limitation anywhere in Thys's claims that the pervious belt shall be of "closely woven wire".

Fig. 1 of the Thys patent, which shows "a central, vertical section of the separating machine", is, to use an expression of which plaintiffs' counsel seems fond, almost a "Chinese copy" of Fig. 1 of the patent in suit.

Finally, Miller admitted that the netting material in this Thys patent performs the identical function that the mesh performs in the patent in suit.

(f) Wardell, No. 1,480,354, January 8, 1924:

The patent in suit points out that "the fabric cord from which the net is woven presents a nap-like surface", and helps further to increase "the

tendency for leaves, petals and stems to adhere to the surface of the netting”.

Disclosing an apparatus for removing dust from roofing grit, Wardell shows a hopper delivering material to the upward-moving surface of a “belt 10 * * * preferably surfaced with a layer of 31 of material having a pronounced nap, such as carpeting or cocoa matting or a specially constructed fabric of a brushlike character. The dust will thus be received into the nap and thereby be carried upwardly away from the granular material.”

6. The Disallowed Claims:

The file wrapper shows that Miller's original claims 1 and 2 were rejected by the Patent Office. Those claims read as follows:

“1. In a machine for separating picked hops from leaves, stems and other foreign material, a pervious separator belt composed of textile netting material having a diamond-shaped mesh slightly smaller than the size of the hops to be separated.

“2. In a machine for separating picked hops from leaves, stems and other foreign material, a pervious separator belt composed of netting material formed from textile cords and having a mesh slightly smaller than the size of the hops to be separated, and knots formed at the points where the cords intersect each other to form the meshes of the netting material.”

On February 8, 1940 the Examiner in the Patent Office wrote to the attorney for the plaintiffs in part as follows:

“claims 1 and 2 are rejected as unpatentable over Thompson in view of Scott (supra). It would not in view of Scott, constitute invention to make Thompson’s screen of fish net or similar material.”

On June 5, 1940, the Patent Office wrote as follows:

“Claims 1 and 2 are rejected on the reasons of record. These claims merely call for an endless belt screen made of the textile material, so applicant’s argument is inapplicable. Screens are used for all kinds of material so the material treated cannot serve as a patentable distinction.”

On June 10, 1940, Miller, through his attorney, wrote to the Patent Office, canceling Claims 1 and 2.

So great is the similarity of the rejected claims to the allowed ones, that a student of this record wonders how this apparent inconsistency in the Patent Office came about.

The plaintiffs’ specious attempt to distinguish between the sheep and the goats will next be considered.

7. The Crossbars and the Cross Slats:

The two rejected claims made no mention of crossbars or cross slats. On the other hand, both of these types of fishnet support are specified in Claims 1 and 2 of the patent as granted. On his redirect examination, with reference to rejected Claim No. 1 Miller testified that “the fishnet would not work without the supporting cross slats”. Miller made the same comment regarding the Thys patent, supra,

in which Doble conceded that cross slats and what counsel called "cross rods" "are not shown specifically". This contention as to the inoperability of the rejected claims will be considered in a moment.

The use of crossbars and cross slats on chains is old. Miller himself admitted this. Doble testified that a cross slat "is a ledge placed on a conveyor, which is a very common practice * * * It is a very common expedient for lodging material on a conveyor belt." Hamachek, in No. 1,153,304, granted on September 14, 1915, for a pea-separator, teaches that "The inclined chute 86 discharges onto an inclined conveyor belt 91 which is in the form of an apron of canvas or other suitable material having slats 92."

Horst's No. 1,488,249, *supra*, shows a pair of endless "chains 5" that "are spaced apart to form a belt of any desired width and they are connected by means of a series of rods 6. Supported by each rod is a slat or plank 7 * * * The slats 7 are sufficiently wide to overlap each other * * * and they therefore present an inclined step-like surface upon which the hops to be cleaned are deposited," etc.

In Silver's leaf catcher, No. 1,895,268, patented on January 24, 1933, there is shown an inclined element which "preferably comprises a series of transversely disposed parallel bars, interlocking at their ends, forming an endless carrier one end of the series running over sprockets 2," etc.

The presence of crossbars and cross slats in Miller's patented claims, and the absence thereof in

the rejected Claims 1 and 2, are not sufficient to explain the apparent inconsistency of the Patent Office in allowing the former and disallowing the latter. The rejected claims were not thrown out because they were inoperable without bars or slats, but because their teaching of "an endless belt screen made of the textile material" did not "constitute invention". And we must ever bear in mind Miller's statement: the mesh is the invention.

8. The Principle of Integration:

Both in physics and in metaphysics, the principle of integration is fundamental in human thinking. Dr. George P. Conger³ defines it thus:

"I mean now by integration a combination, or successive combinations, of parts forming wholes which, as wholes, have properties other than those of the parts taken severally. * * * * *

"All that need be claimed is that the whole, or integrate, is other than its parts when the latter are taken severally."⁴

Though Doble did not refer to the principle of integration *eo nomine*, he applied this test to the patent, and found Miller's device wanting. The defense expert's testimony on this point was emphatic, unequivocal, and reiterated.

"There is nothing startling, nothing beyond

³Professor of philosophy, chairman of department, University of Minnesota.

⁴"Integration", in "Essays in East-West Philosophy", edited by Dr. Charles A. Moore and published by the University of Hawaii Press (1951), at pages 271 and 273.

the addition of one element to another element to make up the assemblage of parts.”

* * * * *

“Each (function in the claims) contributes its little portion as it did in the art. In other words, it is merely adding: two and two makes four. There is no surprising result, nothing unexpected. It is merely the summation of the operations—functions of the elements that are old in the art.”

* * * * *

“There is no new or startling function. It is merely the added function of each of the elements. There is nothing, you might say, spontaneous or creating something new. It is merely the addition of two and two equal four. Each of the elements contributes only just what it had done in the prior art, and the total result is a summation of each one of those individual elements and not something beyond that.” (Emphasis supplied.)

In other words, Miller’s combination patent lacks integration.

A careful comparison of the patent in suit with the disclosures in the prior art convinces this Court that Doble’s appraisal of the plaintiffs’ device is correct.

9. Commercial Success:

In their briefs, the plaintiffs stress “the striking commercial success” of their patented article.

The Supreme Court has held, however, that “without significance on the question of novelty is the fact that * * * utility resulted and commercial success followed from what the patentees did.”⁵

10. The Great Atlantic & Pacific Tea Co. Case:

So apposite to the instant case are the legal principles enunciated by the Supreme Court in its recent decision in *Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp.*, supra, that it is possible to apply, almost sentence by sentence, the language there used to the various elements of the instant case.

In that case, the asserted invention was of a cashier's counter equipped with a three-sided frame, or rack, with no top or bottom, which, when pushed or pulled, would move groceries deposited within it by a customer to the checking clerk and leave them there when it was pushed back to repeat the operation. It was kept on the counter by “guides”.

There, as here, three claims of a combination patent were challenged on the ground of want of invention.

Let us now apply the language there used to the situation at bar.

1. “* * * if the extension itself were conceded to be a patentable improvement of the counter, and the claims were construed to in-

⁵*Toledo Pressed Steel Co. vs. Standard Parts Inc.*, 307 U.S. 350, 356-357 (1939). See also *Dow Chemical Co. vs. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 330 (1945).

clude it, the patent * * * would be invalid for overclaiming the invention by including old elements, unless, together with its other old elements, the extension made up a new combination patentable as such." (Emphasis supplied.)

In the instant case, Miller testified that the fishnet is the invention; or, at most, the fishnet plus the crossbars and the cross slats. Yet his claims cover many other old elements such as spaced endless sprocket chains, upper and lower pairs of sprocket gears to support the chains, means for maintaining a continuous flow of air through the netting material, etc.

And, as has already been shown in some detail, the old elements that he testifies are the invention, and the other old elements that, in his testimony, Miller does not claim as his invention, do not make up a new combination patentable as such.

2. "The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable." (Page 152.)

This involves the principle of "integration", which has already been fully discussed, with especial reference to the patent.

"This case is wanting in any unusual or surprising consequences from the unification of the elements here concerned." (Page 152.)

"The fabric cord from which the net is woven presents a nap-like surface" just as it did in the

days of Peter, the Big Fisherman. There are no unusual or surprising consequences from the unification of any of the old elements here concerned. It is to be expected that "leaves, petals and stems" are likely to "adhere to the surface of the netting."

4. "Two and two have been added together, and still they make only four." (Page 152.)

This is almost the identical language used by the defense expert Doble. The emphasis placed by counsel upon the fact that every element of this patent—including the fishnet—is "old and ancient", will be recalled. And we have seen that the addition of these ancient and accepted elements "still * * * make(s) only four".

5. But commercial success without invention will not make patentability * * * When, for the first time, those elements were put to work * * * although each performed the same mechanical function * * * that it has been known to perform, they produced results more striking, perhaps, than in any previous utilization. To bring these devices together and apply them was a good idea, but scores of progressive ideas in business are not patentable, * * *" (Page 153.)

So here, the plaintiffs claim a "striking" commercial success, using the very adjective employed by the Supreme Court in describing the results of the "utilization" it was there considering. Yet the Court did not hold, as the plaintiffs here claim for their device, that such "commercial success" "corroborates the existence of invention". Invention

must be shown independently; and this the plaintiffs have not done. The most that can be said for their device is that it is a "good" and "progressive" "idea"; but it is one of "scores of progressive ideas in business (that) are not patentable".

6. "* * * a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components." (Page 154.)

The hyperbole indulged in by the plaintiffs and by at least one of their witnesses, with regard to the patent, illustrates the error that parties fall into when they accept a standard of invention less exacting than that required for an old-component device. The Court believes that the Patent Office fell into the same error.

Although only two years old, the A. & P. Tea Co. case already has been followed by the Supreme Court itself, by our Court of Appeals, and by a large number of other Federal courts.⁶

11. The New Patent Code:

On July 19, 1952, Congress enacted a revision and codification of the patent law, effective January 1,

⁶Crest Specialty, a Limited Partnership vs. Trager, 341 U.S. 912 (1951); Photochart vs. Photo Patrol, Inc., 9 Cir., 189 F. 2d 625, 627 (1951), certiorari denied, 342 U.S. 867 (1951), rehearing denied, 342 U.S. 907 (1952); Park-in-Theatres vs. Perkins, 9 Cir., 190 F. 2d 137, 140 (1951). On the point of "overclaiming the invention by including old elements", see the very recent case of Aetna Ball & Roller Bearing Co. vs. Standard Unit Parts Corp., 7 Cir., 198 F. 2d 222, 227 (1952).

1953. The plaintiffs argue at some length that "By the fact of codification, the Congress has put the stamp of approval upon the affirmative tests of invention announced by plaintiffs' authorities".

A careful study of this new patent code, however, convinces this Court that Congress has not intended to change any of the classical norms by which invention shall be tested.

For example, Section 103 of the new Title 35, quoted in full by the plaintiffs, reads as follows:

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made."

The plaintiffs also quote the Reviser's Note on Section 103, *supra*:

"There is no provision corresponding to the first sentence explicitly stated in the present statutes, but the refusal of patents by the Patent Office, and the holding of patents invalid by the courts, on the ground of lack of invention or lack of patentable novelty has been followed since at least as early as 1850. This paragraph is added with the view that an explicit statement in the statute may have some stabiliz-

ing effect, and also to serve as a basis for the addition at a later time of some criteria which may be worked out.

“The second sentence states that patentability as to this requirement is not to be negatived by the manner in which the invention was made, that is, it is immaterial whether it resulted from long toil and experimentation or from a flash of genius.”

It is difficult to perceive how the plaintiffs can gather comfort from either this section or the Reviser's Note thereon. It would seem that Congress here has clearly indicated that it did not intend to lower the standard of invention which obtained before the new codification—“since at least as early as 1850”. The purpose of the new revision, as the Reviser's Note points out, is not to revolutionize but to “stabilize” existing law.

12. The Question of Infringement:

The modern and the better view seems to be that, once a court finds that a patent is invalid, it need not proceed to determine the question of infringement.

In *Cover vs. Schwartz*, 2 Cir., 133 F. 2d 541, 545 (1943), certiorari denied, 319 U.S. 748 (1943), the Court said:

“The court, in deciding against a patentee plaintiff, may, with propriety, hold (1) that his patent is invalid or (2) that the defendant has not committed acts of infringement, or (3) that not only is the patent invalid but also that the

defendant has not infringed; * * *” (Emphasis supplied.)

The foregoing case was cited with approval in *Sinclair & Carroll Co., Inc., vs. Interchemical Corporation*, 325 U.S. 327, 330 (1945).⁷

Indeed, strict logic would dictate that, once invalidity is found, a court should proceed no further. An invalid patent, like a corporate security issued without a permit,⁸ is “a blank piece of paper”; and a blank piece of paper cannot be infringed.

13. Conclusion:

After listening to the testimony and carefully examining the prior art, the Court is convinced that the patent in suit is invalid for want of invention.

Findings of fact and conclusions of law consistent with the foregoing are to be served and lodged by the defendant.

Dated: February 10, 1953.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed February 10, 1953.

⁷See also *Katz vs. Horni Signal Mfg. Corporation*, 2 Cir., 145 F. 2d 961, 962, n. 4 (1944), certiorari denied, 324 U.S. 882 (1945).

⁸*Black vs. Solano Co.*, 114 Cal. App. 170, 176 (1931), quoted with approval in *Hirschfeld vs. McKinley*, 9 Cir., 78 F. 2d 124, 133 (1935), certiorari denied, 297 U.S. 703 (1936).

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial on the 9th and 10th days of July, 1952, before the Honorable Dal M. Lemmon, Judge of the United States District Court, at Sacramento, California, Stephen S. Townsend and Carl Hoppe of the firm of Townsend, Townsend & Hoppe of San Francisco, California, appearing as Counsel for Plaintiffs, and Arlington C. White and Margaret E. White of the firm of White & White of San Francisco, California, and C. K. Curtright of Sacramento, California, appearing as Counsel for Defendant.

The Court having listened to the testimony and carefully examined the prior art, and having fully considered said cause and filed its written Memorandum therein, and being fully advised in the premises, finds the facts as follows:

Findings of Facts

1.

On December 24, 1940, United States Letters Patent No. 2,226,009 for an invention in a Hop Separator, were duly issued to plaintiff E. Clemens Horst Company, a corporation, as assignee, and ever since that date said corporation has been and still is the owner of said Letters Patent.

2.

On or about October 18, 1940, one Edouard Thys entered into an inclusive license agreement with

plaintiff E. Clemens Horst Company whereby said Edouard Thys became the exclusive licensee under certain patents and patent applications including application for United States Letters Patent Ser. No. 299,986, for Hop Separator, filed October 18, 1939, which matured on December 24, 1940, as said United States Letters Patent No. 2,226,009; and on or about December 30, 1946, said Edouard Thys did assign all his right, title and interest in said agreement to plaintiff Thys Company, and plaintiff E. Clemens Horst Company did consent to said assignment, in writing, on or about January 24, 1947, and plaintiff Thys Company since that date has been and still is the exclusive licensee under said United States Letters Patent No. 2,226,009.

3.

United States Letters Patent No. 2,226,009, in suit, issued on an application of George E. Miller, assignor of the patent to the plaintiff E. Clemens Horst Company.

4.

This action was brought under the patent laws of the United States for alleged infringement of all three claims of United States Letters Patent No. 2,226,009 by Sophie Oeste, owner of a hop ranch at Elk Grove, California.

5.

That the patent in suit is for an alleged combination of old elements which does not meet the affirmative tests of invention that have been announced by the courts. The principles in such cases as Lincoln

Engineering Co. of Illinois vs. Stewart-Warner Corporation, 303 U.S. 545, 58 S.Ct. 662, 82 L. Ed. 1008; and Great Atlantic & Pacific Tea Co. vs. Supermarket Equipment Corp., 340 U.S. 147, are controlling.

6.

That said United States Letters Patent No. 2,226,009 is invalid and void in this:

(a) That long prior to the alleged inventions by said George E. Miller, as recited in claims 1, 2 and 3 of said patent, and more than two years prior to the date of the application which matured into said Letters Patent, the alleged improvements, or all material and substantial parts thereof, had been patented and described in the following patents in evidence, to-wit: Scott, No. 1,107,207, August 11, 1914; Hamachek, No. 1,153,304, September 14, 1915; Horst, No. 1,488,249, March 25, 1924; Thompson, No. 1,583,201, May 4, 1926; Hoffeld, No. 2,115,107, April 26, 1938; Thys, No. 2,138,529, November 29, 1938, and Wardell, No. 1,480,354, January 8, 1924.

(b) That long prior to the said alleged inventions by said George E. Miller of the alleged improvements described and claimed in said Letters Patent, the alleged improvements were devoid of substantial novelty or invention because of the prior art, as shown by the above patents in evidence, particularly with respect to pervious separator belts, alone, as well as in combination therewith of delivery and take-off conveyors, and the same did not constitute patentable subject matter of invention or discovery

within the meaning of the Patent Laws of the United States.

(c) That each component or element of the claimed combinations in the three claims of the Letters Patent sued upon is old and was old in the art more than two years before the Miller application was filed, and admitted on the record by plaintiffs to be so.

(d) That each component or element of the claimed combinations in the three claims of the Letters Patent sued upon contributes and performs only that function which it had performed in the prior art, and there is nothing in any of the claims beyond the addition of one old element to another old element to make up the assemblage of parts without integration.

(e) That the total result or function of the concert of the old elements of each of the combinations set forth in the three claims sued upon is a summation only of each one of the individual components or elements and not something beyond that.

(f) That no unusual, unexpected or surprising consequences flow from the unification of the old elements described and claimed in the Letters Patent in suit.

(g) That even if invention could be found in those parts of the combinations claimed relating to the structure of the separating belt, the patent claims are nevertheless invalid because claiming more than the patentee invented.

(h) The patentee testified that the fishnet is the invention; or, at most, the fishnet plus the crossbars

and the cross slats, yet his claims cover many other old elements, such as spaced endless sprocket chains, upper and lower pairs of sprocket gears to support the chains, means for maintaining a continuous flow of air through the netting material, etc. The old elements which the patentee testifies are the invention, and the other old elements that, in his testimony, Miller does not claim as his invention, do not make a new combination patentable as such.

7.

The plaintiffs have made admissions on the record and the defendants contend that each of the components of all of the claims is infinitely old.

8.

There is no justification on the record for the extravagant claims of the plaintiffs that striking and surprising consequences flow from the unification of infinitely old elements.

9.

The patentee has on the record disclaimed invention in anything but a fishnet or at most a fishnet plus crossbars and cross slats.

10.

The plaintiffs are chargeable with the disclaimers as well as the claims of the patentee.

Conclusions of Law

The Court concludes from the above the foregoing findings of fact, as a matter of law, as follows:

1.

That this Court has jurisdiction of the parties hereto and the subject matter hereof.

2.

That the claims of Letters Patent of the United States, No. 2,226,009, are, and each of them is, invalid for want of invention.

3.

That the claims of Letters Patent of the United States, No. 2,226,009, are, and each of them is, invalid for claiming more than the patentee invented, even assuming there was any invention.

4.

That in view of the foregoing conclusions that the subject matter of each of the three claims of United States Letters Patent, No. 2,226,009 is invalid for want of invention and patentable novelty at the time of issuance of said Letters Patent, it is unnecessary for the Court to pass upon the alleged claim of infringement of said Letters Patent.

5.

That plaintiffs are not entitled to the relief prayed for in the complaint herein or any relief whatsoever, and that the defendant is entitled to a dismissal of the complaint herein, with prejudice, and the defendant is entitled to recover her costs of suit herein incurred.

Let judgment be entered in accordance herewith.

Dated: February 25, 1953.

/s/ DAL M. LEMMON,
United States District Judge

[Endorsed]: Filed February 25, 1953.

II.

United States Letters Patent, No. 2,226,009, issued to E. Clemens Horst Company, a corporation, as assignee, is invalid.

III.

The complaint herein be and the same hereby is dismissed with prejudice.

IV.

That the defendant be and she hereby is awarded costs in the sum of \$.....

Dated: March 18, 1953.

/s/ DAL M. LEMMON,
United States District Judge

Entered in Civil Docket March 18, 1953.

Proof of Service

I, Arlington C. White, a member of the law firm of White & White, patent counsel for defendant in the foregoing entitled action, hereby certify that on this 26th day of February, 1953, Carl Hoppe and Stephen S. Townsend, members of the law firm of Townsend, Townsend & Hoppe, counsel of record for plaintiffs herein, were shown the within Final Judgment and were requested to approve said Final Judgment as to form as provided in Rule 5(d), and said counsel on behalf of said plaintiffs refused to do so, and, further, upon request, said counsel also refused to indicate the disapproval, as provided in Rule 5(d), of the plaintiffs as to the form of the within Final Judgment.

Further, I hereby certify that on the 26th day of February, 1953, I served the foregoing Final Judgment upon plaintiffs by depositing a copy thereof in the United States Mails, postage prepaid, addressed to Townsend, Townsend & Hoppe, Attorneys at Law, Crocker Building, San Francisco 4, California, attorneys for plaintiffs.

/s/ ARLINGTON C. WHITE

[Endorsed]: Filed March 18, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Thys Company and E. Clemens Horst Company, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 18, 1953.

/s/ STEPHEN S. TOWNSEND,
/s/ CHARLES E. TOWNSEND, Jr.,
/s/ CARL HOPPE,
Attorneys for Plaintiffs

[Endorsed]: Filed April 17, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein.

Complaint.

Answer.

Notice of application for default judgment.

Order denying application for default judgment.

Memorandum and order.

Findings of fact and conclusions of law.

Final judgment.

Notice of Appeal.

Cost bond on appeal.

Designation of contents of record on appeal.

Order extending time to docket appeal.

Plaintiff's exhibits 1 to 18 inclusive.

Defendant's exhibits A to H, inclusive.

One volume Reporter's Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 22nd day of June, 1953.

[Seal]

C. W. CALBREATH,
Clerk

/s/ By C. C. EVENSEN,
Deputy Clerk

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

July 9 and 10, 1952

* * * * *

Wednesday, July 9, 1952—9:45 a.m.

The Clerk: Civil No. 6435, Thys Company vs. Oeste, for trial.

Mr. Townsend: Ready.

Mr. White: Ready.

The Court: I see the allegation in the complaint that the letters patent No. 2,226,009 was issued to the defendant E. Clemens Horst Company, and the answer alleges it was issued to George E. Miller, who was the assignor to E. Clemens Horst Company. Can't counsel agree upon the facts as to that? [2*]

* * * * *

Mr. Townsend: We directed some interrogatories to that question, and at that time Mr. White agreed that title would not be challenged.

Mr. White: That is correct.

* * * * * [3]

Mr. Townsend: At this time also the defense of non-infringement appears to have been something as an afterthought, and I wonder if you would be willing to stipulate that the defense of non-infringement is no longer in the case.

Mr. White: No, if your Honor please. We chal-

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

lence the issue of infringement; we deny infringement. We don't care to stipulate.

Mr. Townsend: Enough said. We are prepared to prove, of course, that point.

* * * * *

Mr. Townsend: Plaintiff's Exhibit 1, the patent in suit, No. 2,226,009. Here is Exhibit 1. That would be for your Honor to review, that soft copy that was handed up to the bench. This is the actual exhibit in suit here; this is the original letters.

(The document referred to was marked Plaintiff's Exhibit No. 1.)

* * * * * [4]

Mr. Townsend: The patent in suit is illustrated here on these charts (indicating), which at this stage we will offer in evidence or we will shortly. The first sheet over here shows page 1 of the patent, which your Honor has. It is an enlarged view of the drawings, pages 1 and 2, and the second sheet is a [5] modification of this invention; the same thing, your Honor, only illustrated in different form.

* * * * *

Inside of this triangular traveling belt is a suction fan which shows a draft in this direction, holding the leaves and other foreign matter to the upwardly traveling porous belt so that they are discharged over here, while the hops roll down here to a take-away belt. This figure is a slice right down the middle of the machine, such as this one also, only a mirror image. You will see on this side that the hops come into the belt on this side, whereas over

here the hopper is placed on the opposite side (indicating). It is a mirror image of the same general device.

And this porous belt traveling in this direction powered through the chain-and-sprocket drive, and over here we have blowers as distinguished from the suction fan over here (indicating).

* * * * * [6]

Now, the detail of the porous belt, which incidentally will be referred to constantly in this litigation as the "fishnet belt," is indicated here in detail in Fig. 2 and over here in Fig. 4.

* * * * * [7]

The primary object of this fishnet separator, your Honor, is to produce a cleaner, a premium hop. It does that, as this evidence will show today without any question.

* * * * * [10]

Mr. Hoppe: May it please the Court, as Plaintiff's Exhibit 2 we offer in evidence a certified copy of the file wrapper and contents of the application which matured in the patent in suit.

(The document referred to was marked Plaintiff's Exhibit No. 2.)

Mr. Hoppe: Now, your Honor, the application which eventually led into the patent in suit is what is called a continuation of an earlier patent application which was filed on October 12, 1938, and our invention dates back to October 12, 1938. As Plaintiff's Exhibit 3 we offer in evidence a copy of the patent application, file wrapper and contents.

(The documents referred to were marked Plaintiff's Exhibit No. 3.)

Mr. Hoppe: Now, these file wrappers and contents refer to the patents which the Patent Office Examiner considered [14] during the prosecution of the applications, and as Plaintiff's Exhibit 4 we offer in evidence a book containing the patents relied upon by the Patent Office Examiner. The numbers of these patents are 1,107,207; 1,287,624; 1,523,389; 1,583,201; 1,895,268; 2,115,107, and 2,138,529.

(The document referred to was marked Plaintiff's Exhibit No. 4.) * * * * *

GEORGE EDMOND MILLER

called for the plaintiff; sworn. * * * * *

Mr. Hoppe: As Plaintiff's Exhibit No. 5 we will offer in evidence the enlargement of Figs. 1 and 2 of the patent in suit, and as Plaintiff's Exhibit 6 we offer in evidence the enlargement of Figs. 3 and 4 of the patent in suit.

(The drawings referred to were marked Plaintiff's Exhibits 5 and 6.)

Direct Examination

Mr. Hoppe: Q. Your name is George E. Miller? A. Yes, sir.

Q. You are 74 years of age? A. Yes, sir.

Q. And you reside at Fair Oaks, California?

A. Yes, sir.

Q. What is your business, please, Mr. Miller?

(Testimony of George Edmond Miller.)

A. I am general ranch superintendent of E. Clemens Horst Company.

Q. How long have you been associated with E. Clemens Horst Company? A. Since 1905.

Q. And would you please state what the business of E. Clemens Horst Company from 1905 to the present time has been.

A. In the growing, harvesting and marketing of hops and other farm products, as well as livestock.

Q. And that is the E. Clemens Horst Company that is one of the plaintiffs in this action?

A. Yes, sir.

Q. How does the E. Clemens Horst Company compare in size with other hop growers in this country?

A. Well, it has for the past fifty years been the leading hop grower in the whole world.

Q. Now, would you describe what a hop is, the nature of the plant, the size of it, and its lifetime.

A. Well, the hop is the fruit of the hop vine, and it forms in a bur which eventually develops into the hop.

Q. How long are these hop vines?

A. They vary—the trellises upon which they are grown vary [16] in height from 14 feet to 20 feet.

Q. Are the vines the same length as the trellises, Mr. Miller?

A. Well, the vines are longer than the total height of the trellises, because they climb up over the top of the trellis and lop down, so the vine

(Testimony of George Edmond Miller.)

could be, say, probably from about 20 to 22 feet long or 23 feet long, depending upon the height of the trellis. That would be from the ground to the extreme tip of the vine.

Q. Now, how is a hop harvested?

A. A large percentage of the hops grown on the Pacific Coast are harvested by various kinds of picking machines.

Q. And in days before mechanical machines how were the hops picked?

A. They were all picked by hand labor, which was secured and taken out to the ranch for the period of harvest. They were transients and they picked the hops by hand.

Q. When did mechanical hop pickers come into commercial use?

A. The first time that any hops were picked commercially was in the fall of 1908 with the machine developed by E. Clemens Horst Company, and started in the early part of 1906. During the—the two years that elapsed in between were devoted [17] entirely to experimental work.

Q. Now, in those earlier machines when the hops were picked from the vines was anything else picked with them?

A. Well, in order to be sure that all the hops were picked off the vines it was necessary to take a certain amount of leaves and stems that grew with the hops. It is practically impossible to pick hops only, due to the fact that the vine is inclined to grow in clusters and groups and oftentimes the

(Testimony of George Edmond Miller.)

hops are on the inside of these clusters so that the clusters have to be broken up to extract the hops from the interior, and in doing this you get a mass of vine with some hops, some stems, some leaves, and some broken vines.

Q. And what has to be done with this mixture of hops, leaves, stems, and broken vines, and other foreign material after the hops are stripped from the vines?

A. It is necessary to remove the extraneous material, which is of no value in the brewing industry.

Q. Now, in the past has that been done manually or mechanically?

A. In hand picking it is customary for the hand picker to remove the extraneous matter as he proceeds with his picking. In other words, he picks a layer in the top of his basket and every so often when the layer gets thick enough he removes the extraneous matter, leaving the clean hops in the layers in the baskets. [18]

Q. And in time did the art turn to mechanical means?

A. It became necessary to find mechanical means to pick hops, because there weren't sufficient hand pickers available and the work done by them was not satisfactory to the brewing industry.

* * * * *

Q. In time did the art turn to mechanical means for separating the hop clusters from the leaves and stems? A. Yes, sir.

(Testimony of George Edmond Miller.)

Q. About when did the art turn to such mechanical means?

* * * * * [19]

The Witness: 1908, about 1908.

Mr. White: Thank you.

Mr. Hoppe: Q. How did those first separators work, Mr. Miller?

A. They were unsatisfactory.

Q. In what mechanical means did they work? What was their mode of operation and their structure?

A. There was a rubber belt, an inclined rubber belt, on which the mass was deposited on the theory that the hops would roll down and the flat materials, branches, leaves, and so forth, would follow the belt upwardly, but in reality when we tried it there wasn't—it didn't properly separate a thin enough mass to be satisfactory, and the results were very unsatisfactory.

Q. Is the structure to which you have just referred the type of structure which appears in Fig. 4 of the Horst patent 1,054,119?

A. Yes, sir.

Mr. Hoppe: Plaintiffs offer in evidence as Plaintiffs' exhibit next in order a copy of Horst patent 1,054,119.

(The document referred to was marked Plaintiffs' Exhibit No. 7.) [20]

Mr. Hoppe: Q. And what did the art do, if anything, in an effort to solve these unsatisfactory characteristics of that type of separator?

(Testimony of George Edmond Miller.)

Q. And I understand that you tried some bouncing mechanisms, is that correct?

A. Well, we put jumpers—what we call jumpers—over the top of the belts so that the hops striking these jumpers would bounce on down, whereas the leaf, which had no bounce, would strike these jumpers and slide off and be carried up with the upward travel of the belt.

Q. Following these efforts what did the industry as you know [23] it turn to?

A. The difficulty with all types of separators that we had had up to that time, including the slat belt, was that when the air blew on this belt the tendency was to lift the leaves off of the belt rather than to stick them to it, so we were looking for something that would be a positive grip on the belt.

Now, with the air blowing onto the inclined belt, and I thought if there was some way to let the air go on through, then the leaves and the stems—

Q. You mentioned a slat type of belt, which we have not discussed yet. Would you tell us about that before you get onto the type of separator you are now discussing?

A. The slat type of belt can be best described as resembling a shingle roof, in that the lower end of each one of these slats, which is about five inches wide, is three-quarters of an inch thick, so that you have two slopes; you have the slope of the shingle and also the slope of the tops of the shingles. Now, the tops of the shingles would have

(Testimony of George Edmond Miller.)

a steeper incline than the flat part. The theory behind that being that the leaves would lie on the flat shingle and go on up, and the hops would tend to bounce down over the points of the shingles. Do I make that clear?

Q. Sort of like an escalator in a department store? [24] A. That is right.

Q. Except the shingles would turn over?

A. That is it. The idea being to get two inclines, an incline upon which the leaves could rest and an incline upon which the hops, being round, would cascade down.

Q. Did that prove to be perfectly satisfactory?

A. It was satisfactory excepting for the fact that when you blew air on those shingles the tendency was for that air to lift things up. In other words, the air could not get away. It hit this shingle effect and had to get back, and, well, in going back again it tended to lift the leaves up. So while I was on the train going from British Columbia down to Oregon I thought up the idea of using a perforated cloth or fabric separator belt, and when I got to the Oregon properties I proceeded to get a Japanese we had there to make one of these nets out of hop twine.

Q. Do you recall the year that was in?

A. That was in the fall or summer of 1938.

* * * * *

Mr. Hoppe: Q. And how did you make these separators out [25] of fishnet that this Japanese laborer made for you?

(Testimony of George Edmond Miller.)

A. They were made in a diamond shape for the reason that a hop stem, which was the thing that we had to contend with worse than anything, a hop stem has on them little tentacles where the hops are taken off, and these would catch in these diamonds as they traveled upward and be caught there and retained there. Also, the leaf when it is extracted from the vine very often has a portion left on it that is curved and could easily be engaged by a diamond mesh; and the results of this test were so astounding that we immediately started work to prepare our two big Sacramento ranches for the use of this net the ensuing year.

Q. Now, how did you secure this net to the machine?

A. Well, we had cross-bars put every 12 inches, and I think every 9 inches now—the first ones, I think, were 12 inches apart, and these were metal bars or hardwood bars. We used the hardwood for the reason that if you use metal and it bends it could tear the whole thing up, whereas if you use wood and it broke you could renew the wood and there would be no difficulty.

Then by using very thin wood over the top of the net it didn't interfere with the downward travel of the hops.

Q. Now, what kind of blowing means did you use in that machine?

* * * * * [26]

A. Oh. Well, we used a blower with a distributing pipe which distributed the air practically uni-

(Testimony of George Edmond Miller.)

formly along—at one point at a given place on the belt, at a certain distance from the net which was found to be the most satisfactory.

Q. And how did those machines up in Oregon compare with the figures illustrated in Figs. 3 and 4?

A. They were 3 and 4; they were the 3 and 4 device.

Q. After that first year up in Oregon, the following year did you use that type of arrangement in any of your other ranches?

A. We harvested the crops immediately outside Sacramento, approximately 600 acres.

Q. Those are what you call your Brewer and Perkins ranches?

A. Brewer and Perkins ranches. We fixed that plant entirely with this net.

Q. What were the results there?

A. Well, they were so much better than anything we ever used that we settled on them for all the ranches and we have used them ever since.

Q. And in 1940 did you chance some other ranches over?

A. I think it was—yes, in 1940 we changed the Oregon ranch and the balance of the California ranches.

Q. Did you install any of these separators of the type illustrated in Figs. 3 and 4 in any other ranches in the California area, ranches belonging to other people?

A. We built some machines in 1940. I am not

(Testimony of George Edmond Miller.)

too sure about [27] that time, but about that time we built machines upon which we used these. I don't remember just which ones.

Q. Do you know the names of some of these other ranches for whom you installed this type of equipment?

A. Walter Wissemann has them on his plant, Ed Rooney has them on his plant; they are used, I believe, out at both of the Rainier plants.

* * * * *

Q. And you mentioned a Bear River plant?

A. Yes, the Bear River plant has them.

Q. And Mr. Huss?

A. John I. Huss has them on his.

Q. And have you seen Miss Oeste's plant?

A. No, I haven't.

Q. So you don't know about her plant?

A. I don't know about that.

Q. Now, what is the advantage of having hops clean, Mr. Miller, in this industry?

A. Hops that are clean are hops that are more desired by the industry because they don't like the—in the first place, they don't like to pay for something that isn't hops; in the [28] second place, they claim that this extraneous matter, the leaves and the stems, cause the beer—imparts a flavor to the beer, therefore they demand as clean a hop as is possible to produce.

Q. Is there a financial incentive to the grower to get clean hops?

(Testimony of George Edmond Miller.)

A. Yes. Nearly all the contracts pay for reduced extraneous matter.

Q. How is that premium computed?

A. One cent per pound for each percent * * * of extraneous matter below a fixed amount, which is at the present time 6 percent.

Q. That means if you have 5 percent extraneous matter instead of 6 you get one cent per pound premium over the usual market price?

A. That is right.

Q. And if you have 4 percent extraneous matter you get two cents per pound premium?

A. Correct.

Q. And so on down the line. In your observation of the operation of the separating plants using the fishnet separator what premium is a good user able to obtain?

A. Well, we are able—with our use of the nets we are able to get a hop with a leaf and stem content of from a half to [29] 2 percent.

Q. With your use of the nets?

A. Before we used the nets our leaf and stem content would range from 3½ to 6 percent.

Q. And that was with the old slat type separator?

A. That was with the old slats and the rubber belt before that.

Q. That slat type separator belt, incidentally, that is the one that this Court, when Judge Welch was sitting, declared invalid back in 1943, wasn't it?

A. That is right. * * * * *

(Testimony of George Edmond Miller.)

Mr. Hoppe: Q. Mr. Miller, I hand you a copy of Horst patent 1,054,120, which was issued on February 25, 1913, and ask you if that is one of the devices to which you referred.

A. That is right. This is the cylinder on top (indicating).

The cylinder to which you refer is on Fig. 1 of that patent? A. That is right.

* * * * * [30]

Mr. Hoppe: Plaintiffs offer in evidence as Plaintiffs' Exhibit 8 the Horst patent 1,054,120.

(The document referred to was marked Plaintiffs' Exhibit No. 8.)

Mr. Hoppe: Q. I now call your attention to Horst patent No. 1,054,551 and ask you if that illustrates any of the devices to which you referred.

A. Yes. That is the material that I mentioned in my discussion.

Mr. Hoppe: And the witness was referring to sheet 3 of the patent in his answer. Plaintiffs offer in evidence as Plaintiffs' Exhibit 9 Horst patent 1,054,551.

(The document referred to was marked Plaintiffs' Exhibit No. 9.)

Mr. Hoppe: Q. I call your attention to Horst patent 1,132,011, issued March 16, 1915, and ask you if that [31] illustrates any of the devices to which you referred.

A. Yes. This is the—* * *—inclined belt (indicating).

Q. And that is the bouncing mechanism in Fig.

(Testimony of George Edmond Miller.)

2? A. That is the jumpers.

Mr. Hoppe: Plaintiffs offer in evidence as Plaintiffs' Exhibit 10 a copy of Horst patent 1,132,011.

(The document referred to was marked Plaintiffs' Exhibit No. 10.)

Mr. Hoppe: Q. I call your attention to the Horst patent No. 1,136,423, issued April 20, 1915, and ask you if that is one of the devices to which you referred.

A. Yes. This is the inclined belt (indicating).

* * * * *

Mr. Hoppe: Q. This in Fig. 2 illustrates the device that you call the grizzly, does it not?

A. That is right.

Mr. Hoppe: That is the slightly downhill slide with slats in Fig. 2. Plaintiffs' offer in evidence as Plaintiffs' Exhibit No. 11 Horst patent 1,136,423.

(The document referred to was marked Plaintiffs' Exhibit No. 11.)

* * * * * [32]

Mr. Hoppe: Q. I call your attention to Horst patent 1,408,199, issued February 28, 1922, and ask you if that is one of the devices to which you referred.

A. This has the jumpers moving above the belt, but I did not refer to that particularly. [33]

Q. Is that one of the things you tried in the art?

A. That is one of the things we tried that were thrown out eventually.

Mr. Hoppe: The plaintiffs offer in evidence as Plaintiffs' Exhibit 12 the Horst patent 1,408,199.

(Testimony of George Edmond Miller.)

(The document referred to was marked
Plaintiffs' Exhibit No. 12.)

Mr. Hoppe: Q. Now, I call your attention to patent No. 1,488,249, and ask you if that is one of the devices to which you referred.

A. Yes. This has the slat belt which I described as a shingle roof.

Mr. Hoppe: Plaintiffs offer in evidence as Plaintiffs' Exhibit 13 a copy of Horst patent 1,488,249, and this, your Honor, is the patent that was held invalid.

(The document referred to was marked
Plaintiffs' Exhibit No. 13.)

Mr. Hoppe: You may cross-examine, counsel.

Cross Examination

Mr. White: Q. Mr. Miller, as I understood your testimony, somewhere between British Columbia and Oregon you thought of the perforated belt in the summer of 1939, is that correct?

A. The perforated belt of fabric material.

Q. Of fabric material?

A. Yes, that would be soft and pliable so that the stems [34] would attach to it.

Q. I hand you now copy of patent No. 2,138,529 to Mr. E. Thys, issued November 29, 1938, and ask you whether or not you are familiar with that patent.

A. I am.

Q. Isn't it a fact, Mr. Miller, that the drawing in that Thys patent, Fig. 1, is identical with the drawing labeled "Fig. 1" of this patent in suit?

(Testimony of George Edmond Miller.)

A. The mechanical method of driving is identical.

Q. Is there any distinction between Fig. 1 of the Thys patent which you have in your hand and Fig. 1 of this patent in suit?

A. The distinction is in the fabric that the belt is made of.

Q. That is the only distinction?

A. Yes.

Q. I call your attention to page 1 of this Thys patent which you just looked at, commencing the second claim, line 21, and ask you to read from line 21 to the bottom of the paragraph commencing with the word "This".

A. "This belt may be constructed of a coarse fabric, or a comparatively closely woven wire, or like material, but it must be sufficiently pervious to permit air to be freely drawn therethrough in the direction of arrow A by means of a pair of axial flow fans."

Q. In other words, Mr. Thys said in this patent that his belt could be constructed of coarse fabric, is that true, [35] perforated coarse fabric?

A. Coarse fabric, metal—

Mr. White: If the Court please, I should like to read this into evidence and then I will offer the patent in evidence.

* * * * *

Mr. White: I beg your pardon.— * * * * —It is in the book of exhibits, Exhibit 4.

* * * * *

(Testimony of George Edmond Miller.)

Mr. White: Commencing on page 1, second column, at line 21:

“This belt may be constructed of a coarse fabric, or a comparatively closely woven wire or like material, but it must be sufficiently pervious to permit air to be freely drawn therethrough in the direction of arrow A by means of a pair of axial flow fans, such as shown at G-G, or other suitable suction producing mechanism.”

Q. Now, Mr. Miller, as I understand your testimony just prior to the time I read that, your testimony is that you construed that to mean coarse wire and not coarse fabric; is [36] that right?

A. Yes, metal—metal fabric.

Q. Coarse metal fabric. Notwithstanding that the patentee, Thys, specifically uses the term “coarse fabric” in the disjunctive as distinguished from “closely woven wire,” is that still your testimony?

A. Yes.

* * * * *

Mr. White: Q. How many times, Mr. Miller, do you have to run the hops through the separator machine of the patent in suit in order to effect the cleaning thereof?

A. At the present we are running them through three different processes.

Q. Three different processes?

A. Three different processes.

Q. Will you describe those, please. Will you describe the three processes.

A. The first process that is constantly used in

(Testimony of George Edmond Miller.)

most of the plants is to put it through a cylinder and take out the rough matter, as I explained before—

Q. Just a moment. Is that the—that is the long cylinder [37] with the perforated sheets similar to the one in the earlier Horst patent you discussed earlier, the 1,054,119 patent, is that correct?

A. That is correct, and then they are dropped from there to the separating belt of fishnets where the main separation is accomplished.

Q. Are those fishnets on an incline?

A. They are on an incline as shown in this drawing 3 and 4.

Q. In 3? A. 3 and 4.

Q. 3 and 4. All right.

A. Then from there for a final recleaning they are passed over a recleaning device which is patented by Mr. Thys, and they pass over those before they finally go to the kiln, the purpose of that being to take out a small amount of material that has not been extracted by either of the operations.

Q. Then, as I understand your testimony, you don't go directly to your separating machine as depicted in Figs. 3 and 4 from the picking machine, is that correct?

A. I didn't understand that.

Q. You don't convey the hops directly from the picking cylinders to your machine as depicted in Figs. 3 and 4?

A. This is directly below it.

Q. You first convey the hops after picking

(Testimony of George Edmond Miller.)

through this long cylinder with the perforated exterior? [38]

A. Which is used as a distributor as well as a cleaner.

Q. And then from that long cylinder?

A. They drop.

Q. They are conveyed or dropped underneath?

A. They drop underneath, yes, that is right.

Q. Now, with reference to Plaintiffs' Exhibit No. 13, I call your attention to page 2 of this patent, at the bottom of the first column, which is line 64, and over to the top of the second column on page 2. Would you read that, please.

* * * * *

A. "It may also be stated that it is unnecessary to subject the hops to two or more cleaning operations." Is that the item?

Q. Yes. Now, this is the patent, this Plaintiffs' Exhibit No. 13, 1,488,249, this is the patent which Judge Welch declared invalid, isn't that correct?

A. I believe that is right, yes.

Q. And in this patent you have just read—this patent relates to the overlapping slats?

A. That is right.

Q. And incidentally, those overlapping slats are covered with burlap, are they not?

A. That is right.

Q. In order to get an adherence of leaves and stems? [39]

A. That is right.

Q. To the separating belt?

A. That is right.

(Testimony of George Edmond Miller.)

Q. So this statement you just read, and I will read it again, "It may also be stated that it is unnecessary to subject the hops to two or more cleaning operations," that statement in the patent is incorrect, then, is it not, in so far as actual cleaning operations are concerned?

A. Well, it is not always—that statement probably was correct at that time. This recleaning device is something that has been developed since then.

Q. But this statement, then, you feel was correct at the time it was made?

A. At that time, yes.

Q. It was unnecessary to have more than just the one cleaning operation with the overlapping slats?

A. At that time we weren't picking hops that had an extraneous content of zero to 2 percent.

Q. In other words, in different seasons you have different amounts of foliage on the vines, isn't that true? A. Yes.

Q. You can't tell from one season to another whether you are going to have a great volume of foliage and leaves and the next year quite a less amount of foliage and leaves, so you can't say that you can clean hops with a machine in one [40] operation, can you?

A. That depends on how clean you want to get them.

Q. All right. Now, you said a little while ago in your direct testimony that at the present time you are getting in the neighborhood of 1 to 2 percent

(Testimony of George Edmond Miller.)
cleaning. A. That is right.

Q. Now, you didn't mean to say you were getting 1 to 2 percent cleaning with the separating machine of the patent in suit, did you?

A. You mean——

Q. Figs. 3 and 4.

A. We got the zero to 2 percent with the combination——

Q. Yes.

A. ——of the various separating operations.

Q. Yes, 3, you need a precleaning——

A. That is right.

Q. ——and a distribution——

A. That is right.

Q. ——and then you need a recleaning after that? A. That is right.

Q. So your testimony wasn't that you got zero to 2 percent with the patent in suit?

A. Well, we can get 2 percent with the use of that and without the other in certain years, but when you get excessive extraneous matter in there, then in order to be sure we put in [41] the extra recleaner.

Q. You are pretty familiar with your patent in suit, are you not, Mr. Miller?

A. Well, I should be.

Q. There is no place in that disclosure or specification or writeup, whatever you want to call it specifying that you first have to put it through this long inclined cylinder and then you have to

(Testimony of George Edmond Miller.)

reclean the hops afterwards? There is nothing in the patent about that, is there?

A. Not in this separator patent, no. You take the material as it arrives at the belt.

Q. In other words, now, referring to this long cylinder with the perforated exterior which is shown in Fig. 2 of this 1,054,551 Horst patent, that is an essential element of your cleaning operation, isn't it?

A. No, it is not. We have machines now where that cylinder is eliminated entirely and they drop directly from the picking floor onto the nets. That is the recent and most effective separation possibility, in which event it only goes through two processes.

Q. Where do you have a machine of that character?

A. Well, we have one out here at the Brewer ranch, we have one in Wheatland, we have two in Oregon—

Q. Have you got one out there on your Slough Road ranch?

A. We are planning eliminating all of the perforated cylinders. [42]

Q. Have you got a machine like that out on your Slough Road ranch?

* * * * *

A. You mean out at the Cosumnes River?

Q. Yes.

A. They have the cylinder there.

* * * * *

A. But here at the Brewer ranch we have one

(Testimony of George Edmond Miller.)

without the cylinder, and in the future that is the way they will all be built. We are eliminating the cylinders and we will only have two processes of separation in the machine.

Q. The two processes are what?

A. The fishnet and the recleaner.

Q. The fishnet and the recleaner. But it is always necessary to have both?

A. Well, I don't say it is always—we are using that process. You can get down to 2 percent without using the recleaner.

Q. In certain seasons?

A. But we want to get as near zero as we can, therefore we put the recleaner on.

Q. But you don't mention that recleaner in your patent in suit, do you? [43]

A. The recleaner was not developed at the time we got this patent. That is a future development.

* * * * *

Q. You just stated the recleaner is a recent development. Is that the subject of a pending application, or has it been patented?

A. I am not familiar with the date of the recleaning patent. It is Mr. Thys's patent.

Q. That is Mr. Thys's patent?

A. And he can tell you all about that, because he is familiar with it.

Q. But it is subsequent to your patent here, isn't it? A. That is right.

Q. Isn't this Thys patent 2,138,529 that the recleaner device?

(Testimony of George Edmond Miller.)

A. Well, that is the—well, at the time this was patented it was patented as a separator, but at a later date he made this up into a recleaning device over which the materials were passed for recleaning purposes only.

Q. But this machine of the Thys patent—— [44]

A. It is very similar to that.

Q. It is very similar to that; that is my point. This is the last patent of Exhibit 4, your Honor. And the Thys patent I have just shown to you was issued prior to your own patent, is that not true?

A. The same year, I think.

Q. This was issued November 29, 1938 and your patent was not issued until December 24, 1940.

A. About the same time.

Q. Now, Mr. Miller, will you look at claim 3 of your patent in suit in which—it consists of four elements. You have your preamble, “A machine to separate picked hops from leaves, stems and other foreign materials,” and the first element that you refer to is. “A pervious separator belt composed of textile netting material having a diamond shaped mesh slightly smaller than the size of the hops to be separated.” Do you find that?

* * * * * [45]

A. Yes.

Q. Now, what is meant—what do you mean by “size of the hops to be separated”? What is the size of a hop?

A. Well, they vary. The smallest—a very small

(Testimony of George Edmond Miller.)

hop can go through an opening about a half to three-quarters of an inch in diameter.

* * * * *

We aim to have the slots in these diamond meshes about $\frac{3}{8}$ of an inch.

Q. You spoke about $\frac{3}{8}$ of an inch diameter. You don't mean they are circular?

A. No, the space—the lateral space in the diamond mesh.

Q. That is, the small axis or the small distance is $\frac{3}{8}$ of an inch laterally?

* * * * *

From side to side?

A. That is right.

Q. And what is the length of the diamond in the other direction?

A. They are about an inch and a half.

Q. Now, you started to tell me the size of a hop.

A. Well, a hop is a very small—a seedless hop—a very small seedless hop can be as small as a half-inch.

Q. In other words, a half-inch in the small diameter?

A. The smallest, the narrowest way. [46]

Q. And what is the other distance?

A. Oh, they range all the way from an inch and a quarter to two inches long.

* * * * *

Q. When you say that the average size of a hop—is that a commercial hop?

(Testimony of George Edmond Miller.)

A. That is not the average size; that is the smallest size.

Q. That is the smallest size? A. Yes.

Q. In other words, then, you are making your diamond mesh slightly smaller than the smallest size hop? A. Yes.

Q. But it doesn't so state in this patent. It merely says "slightly smaller than the size of the hops to be separated." A. Well,—

Q. You are taking that to mean, or you intended that to mean slightly smaller than the smallest hop?

A. Yes. In other words, slightly smaller than the hops that you wouldn't want to waste, naturally.

Q. That you don't want to waste?

A. Yes, surely.

Q. In other words, with commercial value?

A. Yes.

Q. So if there is anything smaller than one-half inch by $1\frac{1}{4}$ inches you are not interested in them at all? [47] A. No.

Q. What function does that pervious separating belt composed of textile netting material perform different from the old pervious separator belt of textile pervious material?

A. Which old pervious—which belts are you talking about?

Q. You heard Mr. Townsend say in his opening statement this morning that every element of your claims was old, quite ancient. Didn't you hear him say that? A. Yes.

(Testimony of George Edmond Miller.)

Q. Do you contend now that a pervious separator belt of textile netting material is something new invested by you?

A. I claim that a belt made of netting—a pervious belt of netting had never been used before and is entirely new. The material used in manufacturing this belt is old, of course, but the formation of it into a separating belt was an entirely new idea, had never been used, and proved successful.

Q. Mr. Miller, I hand you now the file wrapper of the patent which was issued to you which you have in your hand, and by “file wrapper” I mean the proceedings before the Patent Office, which is in evidence as Plaintiffs’ Exhibit 2, and I will invite your attention to—

Mr. Hoppe: May it please the Court, I think we are getting a little far afield from the direct examination. I don’t think that this is cross examination, because I didn’t examine him about the contents of that file wrapper. That was [48] in evidence before Mr. Miller took the stand.

The Court: The objection is overruled.

Mr. White: Q. I invite your attention to page 9 of this exhibit, particularly lines 4 to 14 inclusive, wherein two claims are set out, numbered 1 and 2, and I will ask you to read those. Just read them over to yourself. I will read them out loud in a little while, Mr. Miller.

A. And 2, did you say?

Q. Yes.

(Testimony of George Edmond Miller.)

A. What does that apply to?

Q. I will read that, Mr. Miller, and I will direct your attention to something else about that in just a moment. I am reading from the file wrapper Plaintiffs' Exhibit 2, page 9, lines 4 to 14, wherein two claims are set out numbered 1 and 2.

No. 1: "In a machine for separating picked hops from leaves, stems, and other foreign material a pervious separator belt composed of textile netting material having a diamond shaped mesh slightly smaller than the size of the hops to be separated." That is the end of claim 1.

Claim 2: "In a machine for separating picked hops from leaves, stems, and other foreign materials, a pervious separating belt composed of netting material formed from textile cords and having a mesh slightly smaller than the size of the hops to be separated, and knots formed at the points where the cords intersect each other to form the meshes of the netting [49] material." End of claim 2.

Now I will direct your attention, Mr. Miller, to page 14 of Plaintiffs' Exhibit 2 and ask you to read to yourself the first paragraph starting with the words "Claims 1 and 2."

Reading that portion of this file wrapper into the record, it states, "Claims 1 and 2 are rejected as unpatentable over Thompson in view of Scott. It would not, in view of Scott, constitute invention to make Thompson's screen of fishnet or similar material."

The Thompson patent referred to in that para-

(Testimony of George Edmond Miller.)

graph is cited in this Office action of February 8, 1940, Thompson No. 1,583,201, and the Scott patent referred to is cited as 1,107,207.

Now, Mr. Miller, I again invite your attention to this file wrapper Plaintiffs' Exhibit 2, particularly at page 22, and ask you to read the second paragraph of that page commencing with the words, "Claims 1 and 2."

Mr. Hoppe: May it please the Court, I again would like to object because this is improper cross examination; the document speaks for itself. There isn't a thing that this witness can do to change what the Patent Office says or to change what his solicitors have said, and the question before the Court in final argument will be the legal effect of these things; but I don't think this witness should be examined as one would a lawyer to find out what these various [50] expressions mean.

The Court: The objection is overruled.

Mr. White: Q. Reading from page 22 of the file wrapper, Plaintiffs' Exhibit 2, "Claims 1 and 2 are rejected on the reasons of record. These claims merely call for an endless belt screen made of textile material, so applicant's argument is inapplicable. Screens are used for all kinds of material, so the material treated cannot serve as a patentable distinction."

Now, calling your attention as a final matter to those claims 1 and 2, I will invite your attention to page 23, the opening paragraph of that letter

(Testimony of George Edmond Miller.)

to the Commissioner of Patents by your patent counsel.

A. "Cancel claims 1 and 2."

Q. Yes.

A. But 3, 4 and 5 were allowed, weren't they?

Q. Yes. I am calling attention to page 23, reading in the record the first paragraph of a communication by Charles E. Townsend to the Patent Office:

"In response to the Office action of June 5, 1940, the above identified application is hereby amended as follows: Cancel claims 1 and 2."

Now, Mr. Miller, I invite your attention to the Scott patent which the Patent Office had mentioned in this file wrapper, No. 1,107,207, and ask you to read to yourself the [51] underscored markings in the second column starting at line 110.

* * * * *

Mr. White: Reading from this patent 1,107,207, commencing page 2, line 110: "I may make use of an ordinary seine or fishnet, but in order to make use of a heavier thread I prefer to make a net by using large sized cord crossed at suitable intervals to form the correct size of opening and staple the cords together instead of knotting them. Knots take up a great deal of space with small threads."

Q. Now, previous to referring to this file wrapper Plaintiffs' Exhibit 2 and this Scott patent, I believe it was your testimony that you were the first one to use a pervious separator belt composed of textile cords in separating materials.

A. In the separating of hops.

(Testimony of George Edmond Miller.)

Q. In the separation of hops. In other words, you want to qualify your statement now to the effect that you are the first to use that in a hop separating proposition?

A. So far as I know, we were the first to use them in any separating. So far as Scott is concerned, I don't know what he is even separating. What is he separating?

Q. Well, he is separating peas. A. Tea?

Q. Peas, p-e-a-s, peas. A. Peas—oh, yes.

Q. Green pea and bean and cowpea hullers.

A. Oh, yes.

Q. In the separation of peas or beans there is a function performed by Scott's fishnet of separating foreign material from the peas, isn't that true?

A. I don't know. I don't know that it is even used in peas, is it?

Q. According to the Scott patent it is.

A. He says, "I may use it." He doesn't say he ever used it, and I don't know that it ever has been used.

Q. Assuming for the sake of argument, Mr. Miller, that Mr. Scott actually used the machine for separating foreign material and the peas by the use of a pervious textile belt, commonly known as a fishnet, does your separator belt of textile cord or fishnet perform any different function than the Scott?

A. Oh, yes, because he wants to get rid of the knots and I want to use them.

Q. He suggests in there—in fact, he states that

(Testimony of George Edmond Miller.)

the knots are in the way, and you want to use them? A. Yes.

Q. That is the only distinction?

A. Yes, and the fact that I use soft material for it that the hop leaf and stems are attracted towards and hold. [53]

Q. Adhere to, just like the burlap in the slat separator?

A. No, it isn't like the burlap and the sack. It has an entrance there in the diamond mesh that accomplishes the purpose.

Mr. Hoppe: Your Honor, may I just ask one question here? Have you ever read this Scott patent, Mr. Miller?

The Witness: No.

Mr. White: Would you take the opportunity during the lunch hour to read the Scott patent? May I ask you to do that? You don't have to. Would you take that opportunity and read it?

The Witness: Well, I can, yes.

Mr. White: Q. And read the Thompson patent?

A. Yes.

* * * * * [54]

Mr. White: Q. Mr. Miller, we were talking about claim 3 of your patent. Have you got your patent before you now?

A. No, I don't have it.

(Counsel handed a document to the witness.)

Mr. White: Q. And I had directed your attention, Mr. Miller, to the first element, the previous separator belt composed of textile material

(Testimony of George Edmond Miller.)

having a diamond shaped mesh slightly smaller than the size of the hops to be separated. Do you recall that? A. Yes, sir.

Q. Do you recall this morning that you testified that the small sized hop was about $\frac{3}{8}$ of an inch by $1\frac{1}{2}$ —no, about $\frac{1}{2}$ inch on the small diameter and about $1\frac{1}{4}$ to 2 inches on the larger diameter. It is an oval shape. A. That is right. [55]

Q. What is the size of the largest hop that you harvest?

A. Oh, you can have hops that are an inch and a quarter in diameter by $2\frac{1}{2}$ inches long.

Q. An inch and a quarter on the small diameter?

A. I have seen them as much as four inches long.

Q. Now take about 10 percent of the harvest on the large side, would that be about an inch and a quarter in the small diameter and $2\frac{1}{2}$ inches long?

A. Well, I would say that the percentage of hops that was smaller than one inch of the seeded hops would be very small, but of the seedless hops, now, these hops without any seeds in them, the average size is smaller, and there are hops as small as a half-inch.

* * * * *

In actual practice there are no hops that go through our diamond mesh.

* * * * *

Q. Of this Fig. 2 here? A. Yes, Fig. 2.

Q. Will you look at page 2 of your patent, commencing in the first claim, line 12. Page 2, first

(Testimony of George Edmond Miller.)

claim, line 12. You say there. "The meshes of the net are fairly large, but they are slightly smaller than the average size of the hops to be [56] separated."

Now, you testified this morning that the mesh is slightly smaller than the smallest hop. Now, which is correct?

A. Well, they are smaller than the smallest average hop.

Q. Well, then, this statement in the specification—

A. When the average is used, the smallest of the average sized hops. In other words, we have got two kinds of hops. We have got seeded hops, which were the hops which were grown up until about, oh, around 1935—

Q. No, this is a 1938 filing date on this patent.

A. Well, since that time—at that time there were no seedless hops grown, practically, but from then on there were more and more seedless hops used, and at the time of the patent then we were growing seedless hops.

* * * * *

Q. Now, what is the size of the smallest seedless hops that you are directing this patent to?

A. The size of the smallest seedless hop is probably about a half inch.

Q. By $1\frac{1}{4}$?

A. By an average of about $1\frac{1}{4}$, yes.

Q. Now, what is the size of the largest hops of the seedless? * * * * * [57]

(Testimony of George Edmond Miller.)

A. Oh, probably an inch and a quarter by an inch and three-quarters to two inches.

Q. All right. Now, what is the size of the average seedless hop?

A. The average seedless hop would probably be $\frac{3}{4}$ by an inch and a half.

Q. All right. Now, take again this reference to column 1 of page 2. I am quoting again: "The meshes of the net are fairly large, but they are slightly smaller than the average size of hops to be separated."

That would be slightly smaller than $\frac{3}{4}$ of an inch by $1\frac{1}{4}$ inches, is that correct?

A. Well, that is a question of wording. I don't think that has any bearing on the case.

Q. What was your answer?

A. I say that is—the idea is to get it so small that no hops will go through. The patent is clear on that point, that the purpose of the net is not to permit any hops to go through, but still have enough opening that will permit the air to go through and will permit the little spines on the leaf to be intrigued or caught by the diamond mesh and pass on upward, but the question of the size was to get it small enough that the hops would not go through.

Q. And by that you mean that no hops would go through?

A. No hops would go through. [58]

* * * * *

Q. We are talking about that first element, that previous separator belt. Did you take the time dur-

(Testimony of George Edmond Miller.)

ing the noon recess to read the Scott patent and the Thompson patent? A. I did.

Q. And you are thoroughly familiar with them?

A. Well, I am as thoroughly familiar as I ever am with a patent. * * * * *

What I was mainly trying to find out was what the claims were and what the purpose of the diamond mesh was in these two operations.

* * * * *

In the Scott and the Thompson.

Q. Yes. Now, what I am trying to get at, Mr. Miller, is the metes and bounds of what you have invented here, trying to find out. Now, your counsel has already stated that every element of each of these claims is ancient and old, and I am [59] directing your attention to the Scott patent and asking you whether or not the fishnet in the Scott patent does not have the function of separating materials. Isn't that true? A. It is a screen.

Q. It is a screen?

A. The purpose of this is to construct a soft screen that the peas can go through without getting scratched, which is nothing whatever related to hops.

* * * * *

Q. What is left on the top of the Scott fishnet?

A. The chaff is left.

Q. So Scott uses a fishnet to separate materials?

A. He uses it as a screen.

Q. To separate the peas from the chaff, isn't that correct?

(Testimony of George Edmond Miller.)

A. That is right. We are not using it for that purpose in hops.

Q. Isn't it true that the purpose of your pervious separator belt is to separate the hops from the chaff or debris or foreign material?

A. On top of the net, not through the net.

Q. What is on top of the net?

A. The separated materials remain on top of the net except for the fine stuff which might filter through there, but the purpose is to make the separation on top of the net. [60]

Q. Which is exactly the function of the fishnet of the Scott patent, isn't that true?

A. No, the Scott net does not even travel, it is not on an incline.

Q. We are not talking about the incline. We will come to that later, Mr. Miller. We are talking about purely and simply the fishnet, the pervious separator belt, and I am asking you, isn't the function of the fishnet of the Scott patent identical with the function of the fishnet in your patent?

A. No.

Q. What is the difference?

A. Well, the Scott patent has got a screen that the material is passed through.

Q. You say the Scott patent has a screen. Doesn't Scott refer to it as a fishnet? Isn't it a fact that—

A. It is a screen—it is a screen built in the shape of a fishnet, because it is soft and the—in other words, they are depending entirely upon the open-

(Testimony of George Edmond Miller.)

ing in that to permit the beans, peas or other vegetables to go through there.

Q. All right. I will read to you from this patent at page 2, line 110: "I may make use of an ordinary seine or fishnet, but in order to make use of a heavier thread I prefer to make a net by using large sized cord crossed at suitable intervals to form the correct size of opening and staple the cords together instead of knotting them. Knots take up a great [61] deal of space with small threads. A very useful feature of the netting is that it may be stretched in one direction which permits it to contract in the other so that any quadrilateral shape can be obtained for the mesh. By drawing the net into a lozenge or diamond shape, the aperture can be restricted in size in one direction."——

The Court: You left out one line.

Mr. White: I beg your pardon?

The Court: You left out one line. "By drawing the net"——

Mr. White: ——"into a lozenge or diamond shape, the apertures for the discharge of the hulled product can be restricted in size in one direction, and since products like green peas are substantially round, the meshes may be made just large enough for the peas to pass through and no more."

Q. Now, isn't it a fact that Scott uses a fishnet to separate material?

A. He uses it to screen the material. He doesn't use it as a separator; he uses it as a screening de-

(Testimony of George Edmond Miller.)

vice. That is the same as barley has been screened for years. They use cloth in screening flour. But that has nothing to do with my patent.

Q. You say in your patent you use this as a screen to separate the material on top of the net?

A. Yes.

Q. Doesn't anything at all pass through your net?

A. Very seldom.

* * * * * [62]

Q. I would like to have you refer to * * * the last clause of claim 1. You have just testified that very little passes through, and now in the last clause in claim 1 you say, "The mesh in said netting, and the cross slats, retaining the leaves and large stems, but permitting smaller stems to fall through the mesh of material."

A. That is right.

Q. You have just testified—

* * * * *

A. That is a very, very small part of the coarse matter to be separated. There do a few stems fall through there, but that is a very, very small part of the separation operation. The separation is performed above the belt, the major operation is above the belt, but short stems can drop through there and broken leaves can drop through there.

Mr. White: Q. What do you mean by "short stems"?

A. Well, these stems get broken up into little short sticks, which we are very anxious to get out (demonstrating).

Q. You are demonstrating about two inches long?

(Testimony of George Edmond Miller.)

A. Oh, from an inch to two inches long. A very few of them, and there are occasional ones that get through there.

Q. How about the size of the leaves or broken leaves that get through there?

A. Well, there is some leaves that get broken up so small that they are carried down by the volume of material that has to be separated and as a last resort this does take that out. That has a little value.

Q. All right. These small leaves go through the mesh, too?

A. Yes, that is right, the small leaves.

Q. All right. Let's go to the second element of claim 3, which I have just called your attention to, which reads as follows: "A means for disposing the belt on a sufficiently steep incline to cause hops deposited on the surface of the belt adjacent the upper end thereof to roll down the incline and off the belt." Do you see that, Mr. Miller?

A. Yes.

Q. Has that element any different function than the same element in the prior art? A. Where?

Q. Well, take for example the patent that you testified to, about eight years ago, No. 1,488,249, Plaintiffs' Exhibit 13. Look at Fig. 2.

A. Yes.

Q. Isn't there in that drawing means for disposing the belt [64] on a sufficiently steep incline to cause the hops to deposit on the surface of the

(Testimony of George Edmond Miller.)

belt adjacent to the upper end thereof to roll down the incline and off the belt?

A. Sure. Hops are round; they roll down.

Q. And that Fig. 2 shows that exact means, is that correct?

A. That shows that means of hops rolling down. They are still round.

Q. I am talking about the structure shown in Fig. 2.

A. Oh, you mean the construction of the belt?

Q. Yes, and it being on an incline.

A. Yes, it is on an incline.

Q. In other words, the same element that you have got in claim 3 of this patent is found——

A. In the fact that they roll downhill.

Q. ——is found in this Horst patent 1,488,249?

A. Sure. They haven't changed their structure; they are still round.

Q. What I am asking you, Mr. Miller, is the means that you are talking about in claim 3 of this patent the same means shown in the Horst patent——

A. The same general idea of hops being round and rolling down is used in this and is used in the former patents.

Q. And in quite a few earlier Horst patents, too, is that correct?

A. We started out with the idea that hops would roll. [65]

Q. So that no different function is performed

(Testimony of George Edmond Miller.)

by this second element of claim 3 than has been performed years ago?

A. Oh, yes, oh, yes, oh, yes.

Q. There is a different function?

A. The increased function is that it takes out the extraneous matter better.

Q. No, I am talking about the belt now. I am talking about this means of disposing the belt.

A. You mean the method of applying the hops to the separator?

Q. No, I am talking about the language of the second element of this claim, means for disposing that belt on an incline.

A. Well, yes.

Q. Now, that has been done as early as 1908, hasn't it?

A. Yes.

Q. Isn't that right?

A. You mean the hops have rolled down on an inclined plane?

Q. On an inclined plane.

A. And we are still rolling them down on an inclined plane, but we are building the plane of different material.

Q. That is the only difference you have got in this whole patent, isn't it?

A. Yes.

Q. That is right.

A. We are making a different separation.

Q. My attention has just been called to another portion of [66] your patent in suit, Mr. Miller. You have just finished testifying that a very minor portion of the very small stems go through this mesh.

A. Yes. * * * * *

(Testimony of George Edmond Miller.)

Q. I call your attention to page 1, second column, starting at line 3, which reads—of your patent there—which reads as follows: “In working with the hop separator just described”—and you were referring to the Thys separator of the 2,138,529 patent—

* * * * *

“I decided to experiment with different types of pervious separator belts, that is, belts constructed of different materials and mesh, to determine if it was possible to remove not only the leaves but also the major portion of the stems.”

Now, you have just testified that a very minor portion of the very short stems and broken leaves go through that mesh.

A. And the major portion of the stems go over the top.

Q. I see. They don't go through this pervious net? [67] A. No, they go over the top.

Q. Then this element on page 1, lines 3 to 8, is not correct, is that correct?

A. No, this doesn't say they go through. It says to remove them.

Q. It removes them. Then that statement—

A. Well, you remove them by putting them over the top.

Q. I see. All right, let's go on a little farther: “As a result I have discovered that if the woven wire belt previously used is replaced with netting material constructed of textile cord such as used, for instance, in the manufacture of fishnets, and

(Testimony of George Edmond Miller.)

that if the mesh of the netting material is maintained slightly smaller than the average size of the hops to be separated, the smaller stems will drop through the openings formed between the meshes of the net.”

Now, that doesn't say they are removed on the top?

A. It says the smaller stems. It doesn't say the stems; it says the smaller stems.

Q. The smaller stems, but not a major portion of the stems, as you previously talked about up above there?

A. Go over the top—the major portion go over the top, but there are a few that are broken up into short stems, and it is a very small percentage of the stems, and they are—they can pass through there.

Mr. Hoppe: Counsel, I think in fairness you ought to [68] read the rest of that paragraph to the witness instead of stopping in the middle of it.

Mr. White: I don't see any purpose to be gained by that. I am just trying to find out the metes and bounds of what Mr. Miller has claimed to have invented here.

Mr. Hoppe: If you will read the rest of the paragraph you will learn.

A. The larger stems — it describes the whole thing—the larger stems are caught in the mesh and pass over the top.

Mr. White: Q. The larger stems are caught in the mesh. You mean on top of the net?

(Testimony of George Edmond Miller.)

A. Yes.

Q. And pass over the top. But the smaller stems pass through the openings?

A. That is right. That just corroborates what I have just said.

Q. Have you got that Thompson patent there?

A. I think this it it, yes.

Q. In this Thompson patent, Mr. Miller, particularly in claim 2, he describes the plurality of longitudinally disposed sorting chains of differing mesh carried in said sorting frame.

Now, isn't it a fact that the separator described in this Thompson patent performs the same function as the fishnet in your patent?

A. No, not at all. [69]

Q. Separating material?

A. Not at all. It is just a screen that the small potatoes drop through and the larger ones carry on. It would not do anything for hops.

Q. It is still separating debris or foreign material from crops of value?

A. No, it is sorting the size of potatoes. As I read it—possibly I am dumb, but that is the way that appears to me, to be a potato sorter, isn't it?

Q. All right. Now, you have already testified that the second element of this claim 3 is very old in the art and that it performs no different function in your assembly than is performed in all of the prior art machines; isn't that true?

A. Which did what?

(Testimony of George Edmond Miller.)

Q. The means for disposing the belt on an incline, that is very old, isn't it?

A. You mean separating material by dropping on an inclined plane; is that what you are talking about?

Q. I am merely talking about mounting the separator belt on an incline. Now, that has been done since 1908 and on? A. Oh, yes. Oh, yes.

Q. So there is no different function as to that particular element in your combination or assembly of elements than has been performed by that same structure in all of the prior patents? There is no different function performed? [70]

A. You are talking about the chain drive now?

Q. I am talking about mounting the belt on an incline so that the hops can roll down.

A. No, there is nothing new about mounting the belt on an incline.

Q. So therefore that element of your claim performs the same function as has always been performed?

A. The combination of that inclined plane with the proper surface. The whole unit as a unit is what performs the better operation.

Q. Can you keep your mind on the one element of the claim that I am talking about, the means for disposing the belt on an incline? You have got the patent right there before you. We have talked about the pervious separator belt. I am talking now about the second element of this alleged combination, the means for disposing the belt on an

(Testimony of George Edmond Miller.)

incline. A. Well, that is the——

Q. That is the single element I am talking about, Mr. Miller. That has been done since 1908 on, hasn't it? A. That is right.

Q. And the means that you claim in this patent as the second element of claim 3 performs the same function that these machines performed in all the prior machines, isn't that right, since 1908, isn't that right?

A. The method of having the belt travel on an inclined plane [71] is similar to what we done before, yes.

Q. That is right.

Mr. Hoppe: May I address the Court, please? Your Honor, in our opening statement Mr. Townsend pointed out that these were combination claims, that all of the elements were old. It is conceded that they are old. In fact, we contend that they are old. I think that this examination, although it might be good cross examination, is immaterial, because we have already admitted the fact that they are old.

The Court: I am disposed to agree with you. There is no use bringing out something that is conceded by your opponents.

Mr. White: No, your Honor. I point out this difference: I will ask counsel if they will stipulate in addition to stipulating that all of the elements of the combination, all of these claims are old, will they stipulate that the elements in this combination perform exactly the same function that they performed in the prior art machines?

(Testimony of George Edmond Miller.)

Mr. Hoppe: To a certain extent we can agree to that, to a certain extent, but we cannot agree, for example, that the fishnet in the Miller patent accomplishes the same result as the fishnet in the Scott patent, because a mere examination of the patent discloses that that is not so. We can concede that you rotate the belts in the same way as the prior art, because we have so conceded—in fact, we have put in the patents [72] that show that they go around in the same direction. We can concede that the blowers operate in the same way, but what we cannot concede and what you might bring out with the witness is that when all of these elements are combined you get a new and improved result, which is a greater degree of separation. But the elements themselves are old, obviously. We brought out that in the 1908 patent we had a separator belt that went on an incline. But I think that this examination is wholly immaterial.

Mr. White: Will you stipulate, Mr. Hoppe, that the fishnet performs the same operation of separation of the valuable material from invaluable material as it does in the prior art patents?

Mr. Hoppe: No, sir, we will not so stipulate, for the reason that in order for one device to be the equivalent of another it must do the same thing in substantially the same way, and a screen operation is not the same thing as an inclined separating operation, as you well know.

Mr. White: As I understand the stipulation, if the Court please, at this time counsel for plaintiffs

(Testimony of George Edmond Miller.)

will stipulate that each and every element of every claim of the patent in suit is old and substantially shown in prior patents, and that each and every element of each of the claims of the patent in suit, with the exception of the earlier separator belt of textile material, performs substantially the same function that [73] it performed in the prior art. Is that correct?

Mr. Hoppe: No, that is not correct, because we so stated that the result of combining all of these admittedly old elements—and they are admittedly old—by being a combination patent that the result is something new and the result is not substantially found in the prior art.

Mr. White: If the Court please, this colloquy between counsel relative to this point that the defendants are relying and will rely in this case on the recent decision in the case of—I will find it in just a second—Great Atlantic Pacific Tea Company vs. Supermarket Equipment Corporation, decided December 4, 1950 and reported in 340—

The Court: I think we all recognize that.

Mr. White: Yes, and we come to the proposition that the alleged combination must perform some different and new function than the aggregate or summation of the functions of the individual elements of the claims—of the entire combination. Now, the point is I am trying to find out from Mr. Miller the metes and bounds of what he claims as an invention and for which he asks toll from the public as some contribution in this art, and what

(Testimony of George Edmond Miller.)

the public can do outside of his claimed invention—

The Court: Mr. White, I have made no restriction on your examination. Proceed.

Mr. White: All right. [74]

Q. Mr. Miller, you have conceded that the second element of the claim for the depositing of these hops at the top of an inclined separator belt is old in the art, has been done since 1908, and that this means and this combination performs exactly the same function as it did in all these prior machines; is that your testimony?

A. Well, now, you say exactly the same function?

Q. By letting the hops roll down the inclined belt.

A. Mechanically the method is similar or apparently—approximately the same as the original method of applying the product to an inclined plane.

Q. All right. Now, the next element, “Means for imparting continuous movement to the belt in a direction opposite to the rolling of the hops.”

A. That is an upward traveling belt.

* * * * *

Q. That has been done since 1908 and on?

A. That is right.

A. That element performs no different function in your assembly than it performed in the previous—

A. That feature of it is identical.

Q. And the last element, “A means for main-

(Testimony of George Edmond Miller.)

taining a continuous flow of air through the belt with sufficient velocity to cause leaves and the like to adhere thereto." [75]

A. That is old, too.

* * * * *

Q. And that element performs no different function in this assembly than it did in the prior art?

A. That is right.

Q. All right. Now, turning to claim 2, you start off in claim 2—I will find it in just a second. "A pair of spaced endless sprocket chains"—do you see that? It starts on page 3, line 7, Mr. Miller.

A. O.K. * * * * * [76]

Q. Now, that element is old and has been used in all these prior machines since 1908, too, hasn't it?

A. Yes. All right. Yes.

Q. That is old?

A. That is the carrying mechanism for the belt.

Q. That is right, and that performs no different function in this combination than it did in the prior machines and prior patents? A. That is right.

Q. That is right. Now, the second element there, "Upper and * * * lower pairs of sprocket gears." Now, that is an old element?

A. That is old.

Q. And that element performs the same function in this assembly as it did in the prior machines, isn't that right? A. That is right.

Q. Now, you have got cross-bars connecting the chains. Now, those are old, too, aren't they, cross-bars connecting the chains?

(Testimony of George Edmond Miller.)

A. They are new in regard to our particular material used and the way they are built, but the operation of cross-bars on chains is old.

Q. It is old? A. That is right. [77]

Q. That performs no different function in this combination than it did in the prior patents?

A. Not as far as an endless chain is concerned.

Q. Now, the next element, "Pervious separator belt composed of netting material woven of textile cords supported by the cross-bars."

Now, that is old, too, isn't it? A. No.

Q. What is new about that, Mr. Miller?

A. Well, it had not been used before for this purpose.

Q. It has not been used before in a hop machine; is that your testimony?

A. No, in separating machines, as far as I know, in the way it is used in this machine.

Q. Now, what do you mean by "the way in which it is used in this machine"?

A. Well, because the separation is on top of the belt here and it is used on an inclined plane for the purpose of separating material by a difference in structure and the ability for one to roll down and the other to follow the belt up.

Q. You follow on in that claim, Mr. Miller, to the statement that "Knots are formed at the points where the cords intersect each other." Do you see that? "Knots are formed at the points where the cords intersect each other to form the meshes of the netting material." [79] A. Oh, yes.

(Testimony of George Edmond Miller.)

Q. Now, that is common to all fishnets, isn't it, knots at the intersections of the cords to form the meshes?

A. For fishnets? Yes, that is the way they are built.

Q. That is the way they are built. That is a common fishnet?

A. Yes. They are not put there for this purpose in fishnets, though; they are just knots because they happen to be there.

Q. And that is what you are claiming in this patent, isn't it, a common fishnet? Well, now, Mr. Miller, I want to call your attention to patent to Hoffeld No. 2,115,107, issued on April 26, 1938 on an application filed on June 29, 1935 for a corn silker and cleaner. I direct your attention to Fig. 5 of that patent.

Mr. Hoppe: May I ask a preliminary question? Has the witness read this patent yet?

* * * * *

The Witness: I don't remember. I didn't know there was such a patent.

* * * * *

Mr. White: If the Court please, this particular patent that I am inviting the witness's attention to now was cited by the Patent Office during the prosecution of the application [79] which matured in the patent in suit.

The Witness: They cited this patent?

Mr. White: Yes, Mr. Miller; and I am directing it to his attention now. He is presumed to have

(Testimony of George Edmond Miller.)

knowledge of it, because he is presumed to have knowledge of the prior art.

The Court: Proceed.

A. Well, at this point I might say this patent was handled by our patent office in San Francisco, Townsend's office, and some of these things may have been cited and answered by them without my having understood them at all. That is usual in the case of patent applications.

Mr. White: Q. Well, I call your attention to page 2 of this Hoffeld patent, 2,115,107, second column, commencing at line 50 under the caption "Operation," and ask you to read that to yourself, and then I will ask you some questions about it.

* * * * * [80]

Mr. White: I am just directing this witness's attention, if the Court please, to one element.

The Court: Direct his attention. See how we get along.

Mr. White: Q. That second column on page 2, it talks about the operation. Have you read that?

A. I have read part of it, yes.

Mr. White: If the Court please, I would like to read this portion of this Hoffeld patent beginning at page 2, line 50, second column, which is directed to the operation of the endless [81] screen conveyor, as follows, quote:

"The endless screen conveyor is driven * * * from a suitable pulley 30 mounted on the drive shaft 31 through the chain 32 to the sprocket 33 on the shaft 8. The hopper 1 is vibrated by means of an accen-

(Testimony of George Edmond Miller.)

tric 34 on the shaft 31 and the connecting rod 35 connecting with the tie rod 36 connected with the rockers 29.

“The stream of cut corn being directed to the top of the conveyor 3 by means of the chute 2 and the conveyor being vibrated by the mechanism just described the corn will dribble down onto the upper end of the conveyor at the top of Fig. 2. The motors 11 and 12 being in operation will rotate the fans 9 and 10 and cause a blast of air to envelop the conveyor and tend to hold the material falling from the hopper 1 tight against the conveyer, leaving only the rounded kernels free to tumble down the incline of the front face of the conveyor.”

I will read on a little farther:

“The conveyor being made up of round bars as has been described with spaces between the blast of air will blow silks, small pieces of husks and other light and small debris through the interstices where they will be caught in the waste receptacle [82] 37.” End of quotation.

Q. Now, Mr. Miller, isn't it a fact that the operation of the Hoffeld machine which I have just read to you in connection with the——

A. Is that a cloth belt? Is that a fishnet belt, or is it a metal belt?

Q. I am not certain myself, Mr. Miller.

A. I think it is a metal belt.

Q. Well, it talks about interstices.

A. Yes, but it doesn't have the qualities of the pliable, soft diamond mesh net.

(Testimony of George Edmond Miller.)

Q. Mr. Miller, my question is this: Isn't it a fact that the Hoffeld perforated screen belt, plus the blast of air which is directed against it, will tend to hold the material tight to the top or the upper surface of that belt, and that the air blast will blow foreign material through the interstices of the belt? A. Yes.

Q. Isn't that true?

A. Yes. So does this one of Thys. Thys does the same thing.

Q. This one here (indicating)?

A. The one he has with the steel mesh there, yes. It does the same thing.

Q. And you say in your patent, the one in suit—I am reading from page 3, first column, line 20: "While good results have [83] been obtained with netting material made both from wire and from textile cord, that is, cord similar to so-called fishline or that used in the manufacture of fishnets, the fishnet type of pervious belt seems to give the better result." A. Sure.

Q. The best result. In other words, you are claiming both wire and textile cord, is that it?

* * * * *

A. No, I didn't patent the steel, I didn't patent the metal belt.

Q. What did you patent?

A. The fishnet belt.

Q. But you nevertheless say at page 3, first column, line 20, that wire will give good results?

(Testimony of George Edmond Miller.)

A. Well, wire was used and gave results, but it wasn't as good [84] as my more recent patent.

Q. All right, let's go back to this claim 2 again, which is on the last page of your patent. You have already testified that everything that I have read to you so far, down to the knots formed at the points where the cords intersect each other to form the meshes of the netting material are old.

Now we are coming to this next element: "Cross-slats disposed on top of the netting material and securing said material to the cross-bars."

We are talking about these cross-slats 21 here—in Fig. 2. Now, that is old, too, isn't it? That has been done before?

A. You mean cross-slats have been put on chains before? Yes. * * * * *

Q. And they perform the same function in this combination or assembly that they perform in the prior art machines?

A. Oh, yes. Oh, yes. It is just the assembly.

Q. Now we come to the next one. You have got a statement here starting on line 8—line 18 of this claim 2, line 18 on page 3, second column. * * * * *

"Said net and the chains supporting same being disposed on an incline."

Now, that element or the combination of the net and chains supported on an incline, I believe you have already testified as being old and used since 1908 on, is that correct?

A. That is right.

(Testimony of George Edmond Miller.)

Q. So there is no new function of disposing it on an incline in your assembly, is there?

A. No.

Q. Now, you have got the next element starting at line 19, "Means for imparting continuous movement to the belt in an upward direction sufficient to cause it to travel up the incline."

Now, that of course is an old element and the function was done before, isn't that true?

A. That is right.

Q. There is no new function in this assembly.

The next element, "Means for maintaining a continuous flow of air through the netting material."

That means was old and has been done for years, isn't that right?

A. That is right.

Q. And there is no new function in this particular assembly than it has functioned in the prior machines, is there?

A. No.

Q. Now, the next element, "A means for depositing hops, leaves [86] and stems on the netting material at a point adjacent the upper end."

That would be this hopper 36 (indicating). Now, that is an old element, isn't it, was done for years?

A. Oh, yes.

Q. And was done in the 1,488,249 patent?

A. Yes.

Q. That performs no different function in your assembly than it performed in the prior machines, does it?

A. It is simply an assembly composed of old

(Testimony of George Edmond Miller.)

means, which we have already stated, put together in a new way.

Q. And this particular element, hopper 36, is old and has been done before?

A. That is right. * * * * *

Q. Now, after that you say—and this follows on page 3, column 2, line 25—“The mesh in said netting material being slightly smaller than the hops to be separated.”

But that I believe you have already testified that the mesh is slightly smaller than the smallest hop, so that no hop will go through, is that correct?

A. Well, it says, “smaller than the hops to be separated.”

Q. “The hops to be separated,” which would be both small, average and large? [87]

A. It says, “smaller than the hops to be separated.” That is clear enough, isn't it?

Q. That mesh is to separate the hops from the debris, isn't it, so that some of the material will go through the mesh and some won't, isn't that correct?

A. The mesh is provided there to permit the air to go through.

Q. That is the only reason?

A. And the hops to roll down and the trash to be carried upwardly and any small particles that drop through the mesh that are extraneous matter can be disposed of in that way.

Q. Now, isn't it a fact, Mr. Miller, that the mesh of the netting material in the Thys patent

(Testimony of George Edmond Miller.)

as shown in Fig. 2 is to permit the air to go through? A. Yes.

Q. That is correct. In other words, the netting material in this Thys patent 2,138,529 performs the identical function that the mesh performs in your patent? A. That is correct.

Q. It performs the identical function?

A. That is correct.

Q. Now getting to the balance of this claim 2, you go on to say: "to permit the hops to roll down the inclined surface presented by the netting material."

That is old as shown in all the prior patents, including the Thys patent I just referred to, isn't it? [88]

A. That is right.

Q. ——"to permit the hops to roll down the incline," isn't that correct? A. That is right.

Q. And this particular netting material in that respect does not function any different than the netting material in the prior Thys patent, does it—to permit the hops to roll down the incline?

A. That is right.

Q. All right. You go on to say that "The mesh in said netting, the knots formed at the intersection of the meshes and the cross-slats retaining the leaves and large stems but permitting smaller stems to fall through the mesh of the netting material."

Now, as I understand that statement, the knots and the cross-slats are to prevent material from falling through, is that correct? * * * * *

(Testimony of George Edmond Miller.)

The size of the mesh, the cross-slats and the knots at the intersections retain the large stems and leaves?

A. On top of the belt. It retains them on top of the belt.

Q. That is the same function that is performed by other [89] screens or separators, isn't it?

A. But not so well.

Q. But not so well. All right.

Now, let's go to the first claim, which starts at line 34 of column 1 at page 3. Do you find that? It starts at line 34. It says, "Claim 1: In a machine for separating hops from leaves, stems and other foreign material."

* * * * *

Now, you have got a first element there of "a pair of spaced endless sprocket chains."

That is the same as the first element in claim 2.

Now, you have already testified that that is old and it performs the same function in your assembly that it performed before in the prior machines, isn't that correct? A. All right.

Q. The same is true of the next element. "Upper and lower sprocket gears to support the chains." That is also an old element and performs no different function in this assembly than it performed in the prior machines, isn't that correct?

A. That is right. [90]

Q. "Cross-bars connecting the chains," which again you already have testified were old, and those cross-bars performed the same function in this as-

(Testimony of George Edmond Miller.)

sembly as they did in the prior machines, isn't that correct? A. That is right.

Q. All right. The next element, "A pervious separator belt composed of netting material woven from textile cords supported by the cross-bars."

That is an old element, is it not?

A. What is that?

Q. Your counsel has already stated that these are old elements.

A. The elements are old, yes.

Q. All right. "The cross-slats disposed on top of the netting material and securing said material to the cross-bars," which are these cross-slats 21 in Fig. 2, which you say are old and they perform no different function in this assembly than they do in the prior machines, isn't that correct?

A. Yes, the cross-bars. All right.

Q. All right. We come down now to line 43, "Said net and the chains supporting same being disposed on an incline." Which is an old method of supporting a separator belt, is it not?

A. All right.

Q. All right. The next element, "Means for imparting continuous movement to the belt in a direction to cause it to travel up the incline." [91]

That is an old means, is it not, as shown by this Thys patent? A. O.K.

Q. Performs no different function in this assembly than it does in the old machines, does it?

A. All right.

Q. All right. The next element, "Means for main-

(Testimony of George Edmond Miller.)

taining a continuous flow of air through the netting material," which again is an old means, an air blast through a pervious belt? That is an old element, is it not? A. Yes.

Q. And it performs no different function in this assembly than it did in other machines?

A. No. * * * * *

Q. All right. "A means for depositing hops, leaves and stems on the netting material at a point adjacent the upper end," which is again this hopper 36, which is an old element?

A. That is right.

Q. And your assembly performs no different function than it did in the prior art machines?

A. (The witness shakes his head in a negative manner.)

Q. Your answer is "No." Now, at line 50 you have this [92] statement in this claim: "The mesh in said netting material being slightly smaller than the hops to be separated," which we have already discussed. And that element is old for passing material through, is it not?

* * * * *

A. Yes. Well, that is the invention, is the mesh constructed for the separating purposes.

Q. Now, what do you mean by "slightly smaller?" "Slightly smaller?"

A. Well, enough smaller so that hops won't go through.

Q. In other words, if you have got a half-inch hop in one direction you would make it—

(Testimony of George Edmond Miller.)

A. Just enough smaller so that the hops wouldn't go through the screen.

Q. All right. If you have got 4/8ths of an inch would you make it 3/8ths or—

A. Just about 3/8ths.

Q. Just about 3/8ths, drop off an eighth of an inch, and if you have got a hop an inch and a quarter long you drop it off to an inch and an eighth in the other direction?

A. I think the meshes are all about the same. I think they are all about an inch and a half to three-quarters. [93]

Q. Suppose you have a net that is closely woven. Would that do the trick? That would be slightly smaller than the smallest hop. Say it was just a quarter of an inch in width.

A. I don't know what it might be. I simply know what it has to do.

Q. Would you have to experiment with the size of that mesh?

A. No, I arrived at this size and have used the same size since.

* * * * *

Q. You are talking about some specific machine that you built?

A. All the machines that we have are equipped with this size net; besides the machines of many other growers on the Pacific Coast are equipped with the same net.

Q. But you haven't specified that size mesh in the patent at all, have you?

(Testimony of George Edmond Miller.)

A. They have all selected the same size that we are using, practically.

Q. You are talking about people who use your net? A. Yes.

Q. They have selected the same size that you are using, but you don't say in the patent what size of mesh—

A. No, we just say small enough mesh so that the hops won't go through. That is what the patent says. [94]

Q. So that the smallest sized hop won't go through?

A. So that no hop will go through.

Q. That would be anywhere from 1/8 of an inch in width to an inch long, to 3/8ths of an inch in width and an inch and a half long, is that right?

A. We wouldn't want it any smaller than it has to be.

Q. Now, wouldn't you have to experiment—if you were trying to build a net in accordance with this patent wouldn't you have to experiment to determine the size of the mesh?

A. I don't think so.

Q. You don't think so?

A. As long as you knew that you were doing when you started out you would know what you wanted; you would know the purpose of the invention.

Q. You don't disclose or teach in your patent any place how to build that net, do you?

(Testimony of George Edmond Miller.)

A. We say build it so the opening is smaller than the hop.

Q. All right. What size did you determine when you built your machine? What size did you use?

A. Ours, the spaces were put $\frac{3}{8}$ ths of an inch wide and an inch and three-quarters long.

* * * * *

Of course, they come together at the top and bottom, of [95] course.

Q. Do you have that net made specially?

A. All nets are all made specially to order.

Q. To certain specifications?

A. They are not fishnets; they are made for this particular purpose.

Q. I believe we have covered all of claim 1, Mr. Miller, the last clause we were just discussing, "the mesh being slightly smaller than the hops to be separated to permit the hops to roll down the inclined surface presented by the netting material, the mesh in said netting, and the cross-slats, retaining the leaves and large stems, but permitting the smaller stems to fall through the mesh of the netting material."

Now, I want to ask you one thing about that. In claim 3 you say it is the blast of air that causes the leaves and the like to adhere to the netting material; it has nothing to do with the cross-slats or the knots or the mesh. In claim 3 you say * * * "A means for maintaining a continuous flow of air through the belt with sufficient velocity to cause leaves and the like [96] to adhere thereto." A. Yes.

(Testimony of George Edmond Miller.)

Q. Then it is the blast of air that causes the leaves and large stems to adhere to the top of the belt, is that right? A. It assists.

Q. It assists?

A. It turns them over so that they get started on it and it helps to maintain them on the belt.

Q. They drop down into this hopper 36, Fig. 1; they drop down onto the inclined belt and they have a blast of air against them?

* * * * *

A. The tendency is for everything to roll down.

Q. And the blast of air holds it against the belt?

A. The blast of air assists in separating the rolling materials from the flat materials and laying them over on the belt.

Q. And the cross-slats, then, really have nothing to do with holding material on them?

A. Yes, the cross-slats help materially.

Q. What is the size of those cross-slats on the machine that you have?

A. They are about an eighth of an inch thick.

Q. An eighth of an inch thick.

A. And three-quarters of an inch wide. [97]

Q. Are they beveled or are they square?

A. No, they are square.

Q. An eighth of an inch thick?

A. And they are bolted together and the fishnet is in between them.

* * * * *

Mr. White: Q. Mr. Miller, one more question: The purpose of devising this fishnet belt was to just

(Testimony of George Edmond Miller.)

give a fuzzy, naplike surface so that approximately 90 per cent of the leaves and large stems would go to the top of the conveyor, isn't that it?

A. That is right.

Mr. White: That is all, your Honor.

Redirect Examination

Mr. Hoppe: Q. Mr. Miller, early in your cross-examination you point out that one difference between the Thys patent and your patent was the fact that you used fish netting and he used wire netting. Do you recall that? A. That is correct.

Q. Is there any other difference between your patent and the Thys patent?

A. Well, the Thys patent operates their belt without any cross-slats, whereas it is necessary with a net to have a support below and above the net, and this same slat that is [98] put on the top adds to the purpose of assisting in the separation of the hops from the leaves and the trash.

Q. That is the slat 19 and the slat 21 in Fig. 2?

A. That is right.

Q. And those are not found in the Thys patent?

A. That is correct.

Q. And do you recall you were examined concerning the Patent Office disallowance of claims 1 and 2 of your patent, which called for a fishnet only? Do you recall that examination when Mr. White was reading from the file wrapper?

A. Fishnet only? I don't believe I know what you are talking about.

(Testimony of George Edmond Miller.)

Q. You recall Mr. White examining you as to this claim, "In a machine for separating picked hops from leaves, stems and other foreign material, a pervious separator belt composed of textile netting material having a diamond shaped mesh slightly smaller than the size of the hops to be separated?" Do you recall he read that claim to you?

A. Yes.

Q. Would a device having such a claim work without these cross-slats and without the blast of air?

A. No, the fishnet would not work without the supporting cross-slats.

Q. And without the blast of air?

A. That is right. [99]

* * * * *

A. It would do some work without the blast of air.

Q. Would it be effective?

A. It is more effective with the blast of air.

Q. Would you get the 1 to 2 per cent impurity which you now get without the blast of air?

A. Not in the capacity that the belt can handle.

Q. Without the blast of air the leaves would fall right down with the hops, would they not?

A. They would be more apt to channel down.

Q. Now, you were examined concerning the Scott patent, which was the fish netting used for separating peas from the pea vine and lima beans from the lima bean vine. A. That is right.

Q. Now, in that particular device did the Scott

(Testimony of George Edmond Miller.)

fishnet operate in the function of traveling on an inclined plane and permitting the materials that you wanted to save to roll down the fishnet and the other material to go up the fishnet?

A. It had none of those uses whatsoever.

Q. Now, you have examined the Scott patent?

A. Yes, sir.

Q. And in your opinion as a man skilled in the hop separator [100] art, would that machine be useful in separating hops from hop vines?

A. It would be useless. * * * * *

Q. You have examined the Thompson patent?

A. Yes, sir.

Q. In your opinion as a man skilled in the hop separator art, would that patent be useful or useless in separating hops from the hop vines?

A. It would be useless.

Q. And you have examined the Hoffeld patent? That is the one that had the corn tassel, the last one—

A. No, I didn't examine it. I just heard it discussed, but I didn't read it through in detail.

Q. Now, you mentioned in response to some of the questions that Mr. White asked you that the function of the cross-slats which are found in your device is the same as the function in the prior art. In what prior art device that you know of did you find the function of two cross-slats holding netting material, one between the other?

A. There was no such arrangement where the cross-slats supported a net, but the old slat separator

(Testimony of George Edmond Miller.)

belt was composed of cross-members which were connected to the chains and they acted to keep the chains equidistant to pass over the sprocket, so they accomplished the same result in that particular by [101] keeping the chains the same space all the way up and down the belt.

Q. And did those belts have the belt sandwiched in between one cross-slat and another cross-slat?

A. No, there was no upper slat that had the effect of assisting in the separation of the hops. Actually the supper cross-slat and the knots have a great bearing on the improved separation accomplished by the fishnet separator.

Q. And is that a function that is not found in the prior art?

A. That was never used in the prior art.

Q. And the sandwiching function, was that used in the prior art, of one cross-slat on top of another holding a belt material of some kind?

A. No, there is no such belt construction.

Q. In the prior art any place are you aware of anyone who used a fabric fishnet in a slat type separator for the purpose of separating materials in any fashion whatsoever?

A. Not in a net.

Q. In a net.

A. No, as far as I know there was none ever used in a net. Separation was performed in the patent of 1908 on an inclined belt— [102]

* * * * *

Mr. Hoppe: Q. Now, these cross-slats that are on the belt, do they have a function in addition to

(Testimony of George Edmond Miller.)

keeping the chains apart and in addition to holding the belt onto the chains?

A. Yes, the upper slat is just high enough that it presents a slight obstruction to the downward travel of the mass and tends to thin it out until the proper separation takes place.

Q. Now, in your examination concerning the question of the size of this mesh you were asked something about whether you had to experiment to obtain the proper size. Do you know of any people that have constructed the fishnet separator type of machine under the teachings of your patent that have had any difficulty in making knots of the right size to make the mesh of the right size?

A. I haven't heard of anyone.

Q. You have heard of no one having any trouble?

A. No.

Mr. Hoppe: That is all.

Recross Examination

Mr. White: Q. Mr. Miller, these cross slats were beveled rather than at a right angle? [103]

A. No, they are square-edged.

Q. But if they were beveled they would perform the function of keeping the chains separated, would they not? It wouldn't make any difference whether they were beveled or square-edged,

A. You mean as a spacer on the chains?

Q. As a spacer on the chains.

A. The top ones don't have that function, however.

(Testimony of George Edmond Miller.)

Q. The lower ones have that function?

A. The lower ones have that spacing function.

Q. Do you have a drum—as a matter of fact, there is no drum at the upper and lower levels of that modification?

A. No, they are open.

Q. What do you mean, “they are open?”

A. I mean there is no drum around the shaft.

Q. No drum around the shaft at all?

A. They are open between the sprockets.

Q. Yes. Mr. Hoppe just asked you if anyone had any trouble in making the mesh of the correct size. Do you recall that?

A. Yes, and I said that I didn't recall anyone who had.

Q. Didn't you testify on direct examination that you had manufactured machines for others? You did all the manufacturing of these machines, did you not?

A. Oh, I think there were those that copied our system of separation and are using them today.

Q. You say you think. Do you know of anyone? [104]

A. I don't know.

Q. You don't? A. No, I don't.

Q. Any machines that are in use using a fishnet were made by the Horst Company or yourself under your direction?

A. No, I think people made their own.

Q. You think. You don't know of anybody that made them? A. Yes, I do know.

Q. Who, for example?

(Testimony of George Edmond Miller.)

A. Well, I think the Rooney boys put it on their machine.

Q. You think they did?

A. We didn't build it for them.

Q. You know it was——

A. They are paying us royalty for it.

Q. Yes, I know they are paying you a royalty on a finger patent, but they haven't built, have they, a fishnet type of separator belt as yet?

A. Yes.

Q. When did they build it?

A. Two or three years ago.

* * * * *

Q. That is the Rooneys out on the Slough House Road? A. Yes.

Q. And they have a fishnet type of separator belt? [105]

A. That is what I understand.

Q. You understand. Have you seen it?

A. No. They came to me and asked me what size to get for the fishnet.

Q. What size mesh to use? A. Yes.

Q. And when did they ask you that?

A. Two or three years ago.

Q. Do you know whether or not they built the machine?

A. I am sure they have fishnets in their machine.

Q. Why are you sure about that? Is it based on just that one question they asked you?

A. They told me they were going to put it in.

That is all I know. That is the nearest information I have on it.

Mr. White: That is all.

Mr. Hoppe: No further examination.

The Court: You may step down.

Mr. Townsend: Miss Oeste.

SOPHIE OESTE

the defendant, called for the plaintiff; sworn.

Mr. Townsend: Your Honor, I understand that Miss Oeste is a little hard of hearing. Could I step a little closer?

The Court: You may. [106]

Direct Examination

Mr. Townsend: Q. Miss Oeste, would you kindly state your name, please?

A. Sophie Oeste.

Q. And your address, please?

A. Davis.

Q. Davis, California? A. Yes.

Q. And, Miss Oeste, are you the owner of the hop ranch known as the Oeste hop ranch at Elk Grove? A. I am.

Q. Miss Oeste, are you here today by reason of the fact that a subpoena duces tecum was served on you, this being a copy (exhibiting to witness)?

A. Yes.

Q. Miss Oeste, did you bring with you books and records and matters that were referred to on this subpoena?

A. Well, I got them from my tenant's figures—

(Testimony of Sophie Oeste.)

Q. Pardon me?

A. I got the figures from my tenant.

Q. Did you have any books or figures of any kind relating to the processing and production of hops?

A. No. All I had was the purchase, when the hops were purchased by the hop company.

Q. Did you bring with you those records? [107]

A. Well, I brought one that I had. The others I didn't have where I was. They are in another place.

Q. Where are they now, Miss Oeste?

A. In my old home where I used to live.

Q. Are they available?

A. Well, I think they are. I am not too sure about it.

Mr. Townsend: It is possible, your Honor, that we can cut this down very short. It is a question here of the interrogatories which were answered as to the actual production of hops on the infringing structure, and our information from the Hop Control Board is such that there is quite a discrepancy.

I think possibly, counsel, we may be able to get together and discuss this at some time evening.

Mr. White: Yes, I would be happy to.

Mr. Townsend: Inasmuch as the records are not here pursuant to the subpoena which has been issued and served. I don't know the reason for that, but they are not here.

Mr. White: Well, if the Court please, the ranch was operated first by one party and then by an-

(Testimony of Sophie Oeste.)

other and the records just got misplaced or lost, and Miss Oeste may have some of them and Mr. Henderson, who was formerly on the premises, may have some of them; but we can get together this evening as suggested by Mr. Townsend.

The Court: Well, discuss it with counsel. [108]

Mr. Townsend: It may be that we will be able to get together on it. I can't do anything now except to ask you, if I may, for whatever records you have with you, Miss Oeste. Do you have any with you?

The Witness: I will show you what I have, what I brought myself. That is all. This is for 1950.

Mr. Townsend: Q. Do you have a record or a little summary of the production?

A. Well, I did have. I think I still have. I don't know. We had a fire in our basement a year and a half ago.

Q. But that is all you have today?

A. That is all I have.

* * * * *

Mr. Townsend: Q. Now, there is one other thing, Miss Oeste. I will have to show you here an agreement, an agreement dated July 10, 1943 (exhibiting to witness). A. Yes.

Q. And it apparently bears your signature, "Miss Sophie Oeste." A. Yes, it does.

Q. And the signature of what appears to be "Mr. Ed Thys." A. Uh-huh.

Q. I will ask you if that is your signature. [109]

A. It is.

Q. And I notice attached to this same document

(Testimony of Sophie Oeste.)

is an assignment which appears to have been executed by you, Sophie Oeste, and dated November 13, 1945, and I ask if that is your signature?

A. Well, it looks like my writing. I don't remember the document at all, but it looks like my writing. You see, I had a man managing the place there for me at the time. I wasn't over there, and took no active part in it. He came over to Davis to see me. [110]

* * * * *

Mr. White: If the Court please. This agreement that Mr. Townsend has, I object to any question or any testimony with respect thereto on the ground that it merely refers to an application by a serial number which is intended to be included later if the patent is issued. There is nothing in the agreement indicating that any application was shown to this witness or they had any knowledge of the subject matter thereof, and it has absolutely no bearing upon the actual patent in suit, cannot be construed as a license under a patent that had not even been issued, and there is nothing of record or attached to this agreement to indicate the subject matter of the pending application. It is entirely too vague and indefinite and has nothing to do with the issues of this case. [111]

* * * * *

Mr. Townsend: Now, this license agreement related to a portable hop picking or hop separating mechanism, a portable device, whereas the accused infringing device is a stationary job which uses the

(Testimony of Sophie Oeste.)

fishnet of the patent patent in suit. * * * * * [113]

Mr. Townsend: Have you looked at this, counsel (exhibiting document to counsel)?

Mr. White: Yes. I can't make heads or tails of it.

Mr. Townsend: These, as I understand it, are records of hop sales made by the Oeste hop ranch in 1950. [114]

The Witness: What is that, that I just gave you a little while ago?

Mr. Townsend: Yes, this is what you just gave me.

The Witness: What did you just ask me ?

Mr. Townsend: Q. I asked you if this is a record of your sales of hops from the hop ranch.

A. That is what I would call it. I don't know.

Q. I see.

A. I am not too familiar—

Mr. Townsend: Counsel, that is apparently what it is, and that is all the records that were produced in answer to the subpoena issued.

Mr. White: I don't see any materiality of these particular sales invoices, if the Court please. They have nothing to do with whether or not these particular hops that were sold went through a separating machine of any kind.

Mr. Townsend: Again, your Honor, we asked for interrogatories and got answers, and we checked up through other sources and found that the answers were considerably off from the records we received otherwise.

(Testimony of Sophie Oeste.)

The Court: That would be some evidence.

Mr. Townsend: We have asked, your Honor, for everything so we could——

The Court: You are entitled to the production.

Mr. White: Yes, and we agreed just a little while ago [115] that we would discuss this matter tonight and try to work out a settlement.

The Court: Then don't take the time up now.

Mr. Townsend: Then we will withhold this—we would like to put it in evidence now, your Honor, for this purpose, if for no other purpose, namely, that it shows a premium paid on these hops that were sold by the Oeste hop ranch. It only shows records for 1950, to be certain, but at least it shows a premium, and I would for that reason like to offer in evidence as plaintiff's exhibit next in evidence——

Mr. White: Whether or not hops were sold at a premium has no bearing on these issues at all, if the Court please. We haven't testified as yet as to how our machine operates and how many processes we go through to clean hops in order to get a premium for our hops.

The Court: I am going to receive it.

(Statement of sales by Oeste in 1950 was marked Plaintiffs' Exhibit No. 14.)

Mr. Townsend: Your Honor, under Rule 43(c) of the Federal Rules I would like to have this license marked as having been offered, if I may.

The Court: You may have it identified, surely.

(Testimony of Sophie Oeste.)

(License agreement dated July 10, 1943, with attached assignment was marked Plaintiff's Exhibit No. 15 for identification.) [116]

Mr. White: Are you through?

Mr. Townsend: Yes, I am through with Miss Oeste.

Cross Examination

Mr. White: Q. I just want to ask you one question, Miss Oeste: Do you know whether or not the hops that were sold in 1950 were seeded hops or seedless hops? Do you know that?

A. No, I don't.

* * * * *

JOHN WESTLAKE

called for the plaintiffs; sworn.

Direct Examination

Mr. Townsend: Q. Mr. Westlake, would you kindly state your name and address, please?

A. John Westlake, Elk Grove.

Q. Is that Jack Westlake? A. Yes.

Q. Are you appearing here under the order of the subpoena duces tecum— [117] * * * which was served, I believe, last night? A. Yes.

Q. Did you bring with you any records, books or other papers relating to the processing and production of hops on the Oeste hop ranch?

A. All I have is the bale count for each year.

Q. Do you have that with you, Mr. Westlake?

A. Yes.

Q. Before, however, asking you for that, would

(Testimony of John Westlake.)

you kindly state your present profession or business?

A. I am running the ranch for Miss Oeste.

Q. What is your position, sir?

A. Manager.

Q. In what capacity? What activities do you perform as manager of the ranch?

* * * * *

A. Everything.

Q. And you are familiar with the production and with the way the product is processed out there?

A. That is right.

Q. And what do you have in response to the subpoena, Mr. Westlake?

A. Well, all the—— [118]

Q. A summary, is it? A. That is all.

* * * * *

Mr. Townsend: Q. Will you kindly tell us what your yearly summary shows?

A. Well, the years of the crops.

Q. Yes.

A. Well, I am not sure of it, because I wasn't there in 1945. I took over——

Q. When did you first come in?

A. In 1949.

* * * * *

Q. Will you give us what you have custody over and what you are familiar with, at least to the extent that you can testify?

A. Well, I had to go to the dealer who bought them and he gave me these figures reluctantly.

(Testimony of John Westlake.)

1945—if you want this——

Q. Yes, if you will, please.

A. 374 bales. [119]

* * * * *

A. In 1946, * * * 506; 1947, 341; 1948, 501; 1949, 462; 1950, 574; 1951, 759.

Mr. Townsend: Q. Now, since 1949—what part of the year 1949 did you first become manager of the Oeste ranch? A. January 15.

* * * * *

Q. January 15, 1949. And since that time you have been actively the manager and in custody of all of the records and matters pertaining to the production of the——

A. Records, no. Everything—the checks and everything go over to Miss Oeste in Woodland, when she lived at Woodland. She is in Davis now.

Q. And the records are kept in that area, not by you?

A. The only thing I have is the money that I spent.

Q. So consequently you have no records to produce in response to this subpoena?

A. That is right.

Q. Except materials you so kindly dug up?

A. That is right.

Q. Are you familiar with the machinery which is used on the [120] Oeste ranch?

A. Fairly well.

Q. You say, “Fairly well.” You must be very intimately acquainted with the machinery.

(Testimony of John Westlake.)

Mr. White: Pardon me. That is argumentative.

A. No.

Mr. Townsend: Q. Are you familiar with it sufficiently to be able to describe the type of equipment which is used to process hops on the Oeste ranch?

A. Yes, I could, but for the last four years I have had asthma and hay fever, so I don't go in there during picking any more, just periodically.

Q. Yet as manager it is your responsibility to see that the hops are harvested and picked——

A. That is right.

Q. ——and all the other factors which go to make a good product, is that right?

A. That is right.

Q. Mr. Westlake, I would like to point out—I think you can see it very easily—a picture of a hop separator, the patent in suit, and I wonder if you can tell me as I go through certain of these elements whether they are found in the equipment which is used on the Oeste ranch to separate hops.

First, do you have a fishnet separator on the Oeste ranch? [121] A. We have.

Q. And is it a separator which separates leaves and stems and things of that nature from the hops themselves? A. That is right.

Q. Does that machine embody a hopper? Does it have a hopper located at the top of the belt?

A. Yes, there is a small—not as small as that, but——

Q. I think we can go very quickly if you will

(Testimony of John Westlake.)

just answer the questions. Does it have a hopper?

A. No, it deflects them. It is not a hopper.

Mr. White: Just a minute. I would like an instruction from the Court that the witness is entitled to answer Yes or No with explanation.

* * * * *

Q. In a separator do you have a belt which is composed of textile cord material? A. Yes.

Q. Which we call a fishnet? [122]

A. Yes.

Q. Does that belt travel in a direction upwardly on this side (indicating)? A. Yes.

Q. And downwardly like that (indicating)?

A. Yes.

Q. And is it supported by some sprockets which are arranged at opposite ends, upwardly and downwardly? A. Yes.

Q. And is that belt inclined upwardly?

A. Yes.

Q. And do the hops come in from some source near the top of the incline?

A. That is right.

Q. And do those hops tend to roll down against the travel of the belt upwardly? A. Yes.

Q. And do you have some means of imparting air under pressure against the travel of this belt in this direction (indicating)? A. We do.

Q. Is that a blower— * * * —of some sort that forces an air blast against the belt which is traveling upwardly and on which the hops are moving downwardly? [123] A. That is right.

(Testimony of John Westlake.)

Q. And do you have in that machine a means of some kind to rotate this belt as shown here in element 48, which is a chain which drives that sprocket? Do you have a mean of rotating the belt so that it revolves in the manner as you have testified?

A. Yes.

Q. Do you have on this belt a pair of chains—I should put it this way: Do you have a pair of spaced chains between which the belt is supported?

A. Yes.

Q. And do you have spacer bars or cross-bars, as they are referred to here at 46, which separate the chains? A. Yes.

Q. And which are attached to the chains?

A. Yes.

Q. And which travel with the chains?

A. Yes.

Q. And do you have a cross-slat or cross-slats over the top of the netting material and attached to the cross-bars to hold the netting in place?

A. Yes.

Q. As is indicated here at 46-A on the drawing? That is present in the machine?

A. That is right.

Q. In this netting material which we have referred to as [124] fishnet are the holes or interstices generally diamond shaped? A. Yes.

Q. And is it composed of a textile cord, knitted textile or netted textile?

A. Cotton cord, yes.

Q. And do those meshes formed by the cords

(Testimony of John Westlake.)

have knots at the intersections of the cords as they cross one another? A. Yes.

Q. As shown generally over here? Or you can't see that?

A. That is all right. I can see it.

Q. Can you see this one back here (indicating)?

A. Yes.

Q. And are the holes, as we call them, the meshes of the net, are the holes small enough so that the hops do not fall through?

A. The small ones, the real small hops, would possibly go through.

Q. They do go through?

A. There is some of them do.

Q. How big are they?

A. Oh, as big as a thumbnail or your little finger.

Q. Real little tiny ones? A. Yes.

Q. Is there enough to worry about?

A. No. [125]

Q. How many would you say?

A. Not enough to cover the floor.

Q. Do the leaves adhere or attach to the fishnet as it travels upwardly under the blast of air?

A. Yes.

Q. And are they deposited outwardly here?

A. Yes.

Q. And the stems and other foreign materials, the trash, is handled in the same way?

A. Yes.

Q. They move upwardly on the belt and are dis-

(Testimony of John Westlake.)

charged— * * * —under the influence of the air blast and the fishnet cord, fishnet belt, is that correct?

A. That is right.

Q. Mr. Westlake, how long have you been acquainted with the hop separating business?

A. I think our first—on the previous job I held, I think we put them in about 1945.

* * * * *

A. 1945. I helped build and built the first machine. [126]

Q. That was your first acquaintance with the hop separating business of any kind?

A. Except by hand.

* * * * *

Q. Then how long were you acquainted with the— A. 1932.

Q. 1932 you first became associated with the hop industry? A. That is right.

Q. And at which time you came to know about the hand picking and hand separating, et cetera?

A. That is right.

Q. Now, as I understand your testimony to be that in 1945 you first became acquainted with the fishnet type separator? A. No.

Q. I am sorry. Will you kindly correct that statement, whatever it was.

A. You asked me if I was acquainted with the building of hop separating machines. It was in 1945.

Q. I see, but not the fishnet? A. No.

Q. When was the first time you became acquainted with the fishnet separator?

(Testimony of John Westlake.)

A. When I went to work for Miss Oeste.

Q. And that was 1949? [127]

A. That is right.

Q. And that was the first time you ever had any opportunity to see a fishnet separator and knew how it worked?

A. No, I think Mr. Thys had one of his portables. We rented eleven of his portables on the Bradley ranch, and I think he had some fishnets on a couple of his earlier machines.

Q. And when was that, please?

A. About 1936. Mr. Thys could tell you. I am a little hazy on it.

Q. That was on the Bradley ranch?

A. That is right.

Q. Now, do you remember what they really were?

A. Just fishnets. I wasn't interested in them at the time and I didn't pay too much attention. I was more interested in getting the crop in.

Q. I see. There may have been something other than fishnets as far as you are concerned? You just don't know? A. No, I am not sure.

Mr. Townsend: That is all.

Cross Examination

Mr. White: Q. Don't you have out at the Oeste ranch a cross-slat separating machine, cross-slat separating machine?

A. Yes, on the small picker we have. [128]

Q. Such as shown in this Horst patent 1,488,249?

A. Yes, we have that. * * * * *

(Testimony of John Westlake.)

Q. Overlapping slats, I mean?

A. That is right.

Q. With burlap on the upper surface?

A. That is right.

Q. Do you use a blast of air with that?

A. No.

Q. The hops roll down or bounce down step by step?

A. That is right.

Q. And the leaves and the stems adhere to the burlap and are carried up over the top?

A. That is right.

Q. Do you also do some manual separating of hops before they reach——

A. To get a good pick, which we try to do, we always have eight or ten women——

* * * * *

After they are dropped into the hopper or——

* * * * *

Before they go to the kiln.

Q. Before they go to the kiln you still have manual separation? [129]

A. That is right.

Q. On that machine that you testified to which had the fishnet on it, isn't it a fact that the ends of the fishnet are supported on drums?

A. That is right, they are.

Q. At the top and at the bottom. In other words, between the spaced sprocket gears at the top you have a drum? That is not just a shaft as Mr. Miller testified to; you have actually a drum in there?

A. That is right.

Q. And that is both at the top and at the bottom,

(Testimony of John Westlake.)

so those drums really support the fishnet, isn't that correct? A. They help.

Mr. White: That is all.

Mr. Townsend: Your Honor, two photographs, one of which shows the corner of bottom portion of a separator machine, a fishnet machine. This photograph will be asked to be marked for identification as the next in order.

(The photograph referred to was marked Plaintiff's Exhibit No. 16 for identification.)

Mr. Townsend: And another photograph, your Honor, of a front view of bottom portion of the fishnet machine, which I will ask be marked for identification as plaintiffs' next in order. [130]

(The photograph referred to was marked Plaintiffs' Exhibit No. 16-A for identification.)

Redirect Examination

Mr. Townsend: Q. Mr. Westlake, I will show you a photograph of the bottom portion of a fishnet separator and ask you if you can identify that fragmentary view of the machine— * * * —as being the machine on the ranch of which you are general manager. * * * * *

Q. Can you identify this?

A. It looks like our birdeake support in back of the screen there. [131]

* * * * *

Mr. White: Birdeage support?

The Witness: Yes. We have some bars. It looks like a birdeage.

(Testimony of John Westlake.)

Mr. White: Is that what I referred to as the drum a little while ago?

The Witness: Yes.

* * * * *

Mr. Townsend: Q. Do you identify that, Mr. Westlake? A. It looks like ours, yes.

* * * * *

Q. Mr. Westlake, I show you a photograph marked Plaintiffs' Exhibit 16-A for identification, and ask you if you can recognize that separator machine?

A. You must have taken some plywood off of the front, huh?

Q. Do you recognize the machine?

A. Well, if the plywood were there I would say it is ours, but I won't now.

Q. You can't recognize it?

A. Not without the plywood on there, because I know we had it on the face.

Q. If I showed you the plywood would you recognize it? A. I would. [132]

Q. I think this may show it (exhibiting photograph to witness). You see the plywood has been knocked off there. A. Uh-huh.

Q. Now do you recognize it?

A. Well, it is cut. I don't know. It looks enough like ours to be ours.

Q. You can't identify it, though, is that correct?

A. I think it is.

* * * * *

Q. Can you tell from a photograph, Plaintiff's

(Testimony of John Westlake.)

Exhibit No. 16-A for identification, whether that is a fishnet separator at all?

* * * * *

A. It is a fishnet separator.

Q. And does it have cross-bars such as we have talked about on drawings over here, namely, the element 46, which spaces the chains?

A. Yes.

Q. And does it have cross-slats which are—I will at this time also show you Plaintiffs' Exhibit 16 for identification so [133] that you can refer to both of them—does it also have cross-slats attached to the cross-bars and between which the netting is attached?

A. Yes.

Q. And does it have apparently a sprocket or gear arrangement there— * * * —which the belt will travel around, as best you can make out from that photograph?

A. (The witness nods his head in an affirmative manner.)

Q. Are the interstices or holes in the netting diamond shaped?

A. They are.

Q. And do those photographs look to you like they are your machine?

A. No, it looks like it had not been cleaned up around there, and we usually keep ours clean. That is the only thing.

Q. Does it look to you like your machine?

A. Yes.

Mr. Townsend: I think that is all, counsel.

Mr. White: No questions. [134]

EDOUARD THYS

called for the plaintiffs; sworn.

Direct Examination

Mr. Hoppe: Q. Your name is Edouard Thys?

A. Yes. * * * * *

Q. You reside in Sacramento and you are a citizen of the United States of America? A. Yes.

Q. How old are you, Mr. Thys?

A. Fifty-three.

Q. Where were you born?

A. In Antwerp, Belgium. [135]

Q. Will you please tell us what your education consists of.

A. Well, when I left—I hadn't finished high school when the war came on, and I served in the Belgian army, and I was about twenty when I came back, and then I finished a four years' course in the University of Vienna.

Q. You took engineering there?

A. I took engineering there.

Q. But you did not graduate?

A. I did not graduate.

Q. Do you know the plaintiff E. Clemens Horst Company? A. Yes.

Q. When did you first become acquainted with the E. Clemens Horst Company?

A. In 1928.

Q. And what did you do with the E. Clemens Horst Company?

A. Well, I went to work for E. Clemens Horst Company in 1929 in their sales department.

(Testimony of Edouard Thys.)

Q. And how long were you in the sales department?

A. Until 1935, and then I started development work on hop-picking machines until 1940.

Q. And in 1940 what did you do?

A. In 1940 I started my own company in partnership with Albert Miller.

Q. Is that the Mr. Miller who just testified here? [136]

A. No connection. In 1946 I bought out Albert Miller's interest and I started my own company.

Q. And what was the name of that company?

A. That is Thys Company.

Q. And that is the other plaintiff in this action?

A. Yes.

Q. And you have been with the Thys Company ever since? A. Yes.

Q. Are you an officer and stockholder of the Thys Company?

A. Yes, I am the president and major stockholder.

Q. Now, have you a familiarity with hop picking and hop separating machines?

A. Yes, I have.

Q. When did you start to acquire that familiarity?

A. In 1930 or thereabouts in an incidental way, but I have been actively engaged in development work in that connection since 1935.

Q. In that development work did you become

(Testimony of Edouard Thys.)

familiar with the slat type of separator that Mr. Miller testified about? A. Yes.

Q. Those are the ones described in the Horst patent 1,488,249, which is the subject of litigation in this Court?

A. Yes, I am familiar with that separator.

Q. How did those separators work from the standpoint of the [137] amount of trash that they are able to separate?

A. Well, they separated a certain amount of trash, like every separator does. It is a matter of plus or minus. Some work better than others. That is, different separators work—do some amount of work.

Q. Were they generally commercially satisfactory?

A. They were in their time until better methods were evolved.

Q. By present-day standards would you call them satisfactory?

A. No, not by present-day standards, because better machines have been developed, and also the brewery trade is more exacting on the quality of hops acquired nowadays than they were in those days.

Q. And did you set yourself to work on the problem of separating stems and leaves from the hops?

A. Yes.

Q. When did you do that? When did you start that? A. In 1935.

(Testimony of Edouard Thys.)

Q. And what was one of your first type of separators that you made?

A. The very first type, I believe, was the drum which was set to revolve at the end of a conveyor and vacuum was maintained inside the drum on one half of the cylinder so that—it is a little difficult to explain without a sketch actually, but it was a small cage that was set at the end of a conveyor, and I think there is a patent application in my name which [138] shows it.

Q. And did you in your subsequent activities turn to the slat belt type of separator?

A. Yes. I then developed a separator with a belt traveling on an incline in which there was provided a vacuum chest between the upper one and the lower one of the belt.

Q. What was that belt made of?

A. Of canvas—burlap, I would say.

Mr. White: Burlap?

The Witness: Burlap, yes.

Mr. Hoppe: Q. And is that the separator that is illustrated in your patent 2,114,727, in Figs. 18 and 19?

A. Yes, that is the one.

Mr. Hoppe: Plaintiffs offer in evidence as their next exhibit in order a copy of Thys patent 2,114,727.

(The document referred to was marked Plaintiffs' Exhibit No. 17.)

Mr. Hoppe: Q. And how did that machine work toward the solution of solving this problem of separating the hops from the leaves and the stems?

A. Well, it was an experimental machine, and

(Testimony of Edouard Thys.)

it very definitely showed a trend; it showed a new idea in the separation, which was the application of vacuum on a belt, and although the first belt did not have enough suction in the chest, it indicated that it had possibilities if it was further developed.

Q. Now, was that a wholly satisfactory machine?

A. No.

Q. What did you then turn to?

A. Then I turned to the separator belt which consisted of a wire mesh and had fans—propeller type fans behind the operating one of the belt, the idea being that the first belt lacked velocity and the vacuum was insufficient and it was an attempt to increase—to remedy both those defects.

Q. And is that the device that is illustrated in Thys patent 2,138,529, which is the last patent in the book of exhibits marked Plaintiffs' Exhibit 4?

A. That is the patent, yes.

Q. In that patent you described the belt in the following language: "This belt may be constructed of a coarse fabric or comparatively closely woven wire or like material." What did you mean by the words "coarse fabric?"

A. Well, I had in mind the belt that I had used on the previous experimental separator. [140]

* * * *

Mr. Hoppe: Q. Now, were you familiar with Mr. Miller's later developments in the separator belt? A. Yes.

Q. And what did he do following your development of the metal belt type separator?

(Testimony of Edouard Thys.)

A. Well, Mr. Miller had about twenty-five years' experience before I entered the picture, and he had worked on the slat type of belt in which the surface on which the hops fell was not smooth, and it had been developed with that consideration, which was given a lot of thought, and naturally when I developed the smooth belt he wasn't entirely enthusiastic about it and felt that the air idea was good but that the smooth belt idea was not so good, and then he worked on a belt that would have a corrugated surface of some kind, of a nap, that would hold the leaves not only by the air effect but by the surface effect of the material. And then he developed that fishnet belt with that idea in mind.

Q. Now, was the fishnet belt his idea, or was that your idea? A. That was his idea.

Q. Do you know anything about the matter of the licensing of the Miller patent in suit?

A. Yes, I do.

Q. And who was in charge of that licensing program? [141]

A. I am—that is, the Thys Company.

Q. And do you know the names of the licensees?

A. Yes, I know the names. I couldn't recite them all—

Q. And under your jurisdiction are figures maintained showing the production of those that use the Miller separator? A. Yes.

Q. And have you made such a tabulation, a tabulation of those figures for the purposes of this trial?

(Testimony of Edouard Thys.)

A. Yes.

Q. Showing the number of bales that are produced on the Miller separator year by year among the various producers in the area? A. Yes.

Q. You have prepared that from the books and records under your jurisdiction?

A. Yes, I did. There are some other figures on there. This tabulation also has—— [142]

* * * * *

Mr. Hoppe: Will you please mark these two sheets plaintiffs' exhibit next in order for identification.

(The documents referred to were marked Plaintiffs' Exhibit No. 18 for identification.)

Mr. Hoppe: Q. Now, on this chart you have some figures that are circled in red. What do those figures represent?

A. Those figures represent the bales that have been picked by the Miller separator, by the use of the fishnet separator.

Mr. White: If the Court please, we move to strike that particular answer and also to limit any further testimony regarding this chart on the ground that it has no bearing whatsoever on the issues in this case.

The Witness: The chart——

The Court: The commercial success is what he is attempting to prove.

Mr. Hoppe: Purely commercial success, that is all it is.

Mr. White: I don't understand the import of it.

(Testimony of Edouard Thys.)

Mr. Hoppe: That is the sole purpose of it, Mr. White.

Mr. White: All right.

Mr. Hoppe: Q. And on this chart you also have the total hop production in the Sacramento Valley, do you not? A. Yes. [143]

Q. And where did you get those figures?

A. From the Hop Control Board.

Mr. Hoppe: That is to give us a control, your Honor, to show the percentage of hops produced under the fishnet versus the total production.

We offer Plaintiffs' Exhibit 18 for identification in evidence.

The Court: Accepted for the limited purpose—

Mr. Hoppe: That is the only purpose, commercial success.

Mr. White: Well, there is one thing, if the Court please. I would like to make this point. Mr. Thys has testified that these numerals on here circled in red indicate tonnage or baleage through the Miller fishnet machine, but there is no testimony that that was the only separator used to clean this baleage. You will recall Mr. Miller testified he used the old Horst cylinder with that separator and they also went over the recleaners, and I would like to object to the offer in evidence until it is clarified whether the Miller machine only was used in connection with these bales, if he knows.

Mr. Hoppe: Q. Do you know if only the Miller separator was used, or if the Miller separator was used in conjunction with other machines?

(Testimony of Edouard Thys.)

A. Well, they are with other machines always, because, in the first place, the Miller separator does not pick the hops. This is only separating the hops after they have been picked by [144] some other machine.

Q. So these figures represent an operation in which the Miller machine was one of the things that was used? A. That is it.

Mr. Hoppe: Mr. White, we will agree that in most of these installations that the Miller separator is but one of several devices that are used.

Mr. White: This chart, then, could not go to the commercial success of this particular patent in suit, when the baleage is covered for an entire year and he has just conceded that there are other separators used.

The Court: I think it bears upon it.

Mr. Hoppe: It certainly does.

Mr. White: May I examine Mr. Thys before it is received?

The Court: You may.

* * * * *

Mr. White: Q. Mr. Thys, take the first figure that you have circled in red here. What is that? The Bear River Hop Farm? A. Yes.

Q. 1945—1944, 1860 bales. A. Yes.

Q. Do you know of your own knowledge whether or not the Miller hop separator machine of the patent in suit was the only separator used in the Bear River Hop Farm in 1944? [145]

A. I believe it was.

(Testimony of Edouard Thys.)

Q. You don't know of your own knowledge?

A. Yes, I do know from my own knowledge.

Q. Where is the Bear River Hop Farm?

A. In Wheatland.

Q. Wheatland, California? A. Yes, sir.

Q. You have been over there? Were you over there in 1944? A. Yes, sir.

Q. And how many separator units did they have?

A. Of the Miller?

Q. Of the Miller and any other separator.

A. I don't know how many they had. They had a number of them, a considerable number.

Q. A number of different types?

A. No, no—of the Miller type.

Q. They also had your recleaner?

A. No, not at that time.

* * * * *

Q. When did they first put it in?

A. I believe in 1951.

Q. All right, 1951. You have got a figure circled here in red, 1822 bales, as against 1860 in 1944. In 1951 they put in your recleaner, which is after the separation by the Miller [146] separator, that you were recleaning with your machine of the Thys 2,138,529 patent, so you can't testify of your own knowledge, can you, as to whether the Bear River Hop Farm had only one cleaner or one separator with two cleaners, or three cleaners?

A. I don't understand the question.

Q. Have you seen the hop separator units at the Bear River Hop Farm since 1941? Have you seen

(Testimony of Edouard Thys.)

the separator units that were used on that ranch?

A. No.

Q. Did you see them in 1951? A. No.

Q. Well, you just testified that you believe they installed your recleaner in 1951.

A. But I didn't see it.

Q. You didn't see it? A. No.

Q. You know as a matter of fact they used it in 1951? A. Yes.

Q. They did use it in 1951? A. Yes.

Q. They used the Miller separator and your recleaner unit in 1951, is that correct? A. Yes.

Q. Did they also use the old Horst inclined cylinder with a [147] perforated exterior for cleaning up the hops before they got to the Miller device? A. Not for cleaning up the hops.

Q. But for distributing? A. Yes.

Q. They used that? A. Yes.

Q. Just as Mr. Miller testified this morning?

A. Yes.

Q. So you have got three processes: You have the old Horst inclined cylinder with the perforated exterior for separating the materials, and then you have the Miller fishnet idea, and then you have your recleaner; isn't that correct? They have got all that on the Bear River Hop Farm, isn't that correct?

A. That is simplifying it a little bit. There is a lot of other processes before that cylinder.

Q. What are the other processes?

A. First of all, they go and cut the vines in the field and they haul the vines to the hop picking

(Testimony of Edouard Thys.)

machine, and there they are lifted in the picking machine proper, which removes the hops and the leaves and the arms and the stems of the vines, and the vines are discharged pretty well clear of the hops and leaves.

Q. On the lower conveyer underneath the picking cylinder, isn't that right? [148]

A. No, it isn't underneath the picking cylinder; it is in the front of it.

Q. All right.

A. And then there is a mesh, a diamond mesh, made out of wire through which the hops are passed as they fall from the picking fingers—

Q. That is a great big triangular endless diamond mesh belt?

A. It is not triangular; it is rectangular.

Q. It is rectangular; it goes all around the machine?

A. It goes all around the machine and the arms that are removed from the vines are retained by that mesh, and at the same time the picking fingers of the drums that are above that mesh keep working on those arms to remove the hops until they fall through the mesh. Then usually, the old machines—the hops fell through a grizzly—

Q. No, we were speaking about this particular ranch up here, the Bear River Hop Farm.

A. Well, I don't remember exactly how they operated there.

Q. But you feel fairly certain that they also used the grizzly, too?

(Testimony of Edouard Thys.)

A. I believe they did. I haven't got the picture of that ranch very clearly in my mind any more.

And then as they fall through the grizzly the hops are collected by conveyors—

Q. And brought up to the top of that— [149]

A. No. The conveyors discharged on an elevator, which in turn discharged in that cylinder you were talking about. [149-A]

* * * * *

Thursday, July 10, 1952—10:00 a.m.

The Clerk: Case . . o. 6435, Thys Company et al. vs. Oeste.

Mr. White: Ready for the defendant.

The Court: I might say to counsel that this morning I was giving some thought or consideration to the offer in evidence of the exhibit consisting of a copy of the contract between the defendant and the Thys Company and assigned by the plaintiff to someone else, and I found a case in which Chief Justice Marshall wrote the opinion, *Evans vs. Eaton*, and in that case the ruling was made that when a person is using a patented article and has recognized the patent by the purchase of a license, that fact should not be absolutely rejected, although it is entitled to very little weight. That is the expression of Chief Justice Marshall in that particular case.

I rejected the offer because I considered it had very little weight, if any weight whatsoever, but in view of the ruling in *Evans vs. Eaton*, 4 Lawyers Edition 433, I will receive the exhibit.

(Testimony of Edouard Thys.)

(Plaintiffs' Exhibit 15 for identification was received in evidence.) [150]

* * * * *

Mr. Townsend: The second point was in the matter of the baleage or poundage produced by the defendants, and there the plaintiffs have adopted the figures given by Mr. Westlake on the stand yesterday as being sufficient for this case, but excepting the 1951 figures. The 1951 figures we have a question about. However, for the purpose of this cause we will adopt those as the measure of damages.

The Court: All except the year 1951?

Mr. White: Last season.

Mr. Townsend: That is right, your Honor.

The Court: Mr. Thys, will you resume the stand.

* * * * *

Mr. White: Mr. Thys, you recall last evening we were discussing the figures on this chart which is in evidence and which is marked Plaintiffs' Exhibit 18 for identification, the figures which you circled in red. Do you recall that? A. Yes.

Q. And we had been discussing the figures on the line opposite [151] the Bear River Hop Ranch.

A. Yes.

Q. And particularly we were discussing the figure 1822 for the season of 1951. Do you recall that?

A. Yes.

Q. And you had testified, had you not, that you were fairly certain that the Bear River Hop Ranch had one of your so-called recleaner separators?

A. Yes, in 1951.

(Testimony of Edouard Thys.)

Q. Yes. Now, in connection with your testimony that you were in charge of the patent licensing program of the Thys Company, and probably also the Horst Company, isn't it a fact, Mr. Thys, that these license agreements that are a part of your program are what we may call package deals, where you haven't just one patent but a series of patents owned by the Thys Company or the Horst Company? Isn't that your program?

A. No, not necessarily.

Q. Well, can you state to the Court any one instance where a license has been granted under the Miller patent in suit to any particular licensee? On the Miller patent only.

A. I couldn't say offhand.

Q. Well, take for example this Plaintiffs' Exhibit 15 in evidence, which was the agreement which Miss Oeste testified to when she was here yesterday, and I call your attention to the second page of that agreement. Isn't it a fact—the [152] exhibit will speak for itself, but you have listed there quite a group of patents, and that is a part of your licensing program?

A. This is a little different, because that is the licensing for the complete portable hop picking machine.

Q. Including a separating unit? A. Yes.

Q. Now, going back to this Exhibit 18 for identification, can you state any particular one of the parties listed in this first column which has a license

(Testimony of Edouard Thys.)

under the Miller patent in suit alone? Just look through them.

A. I don't know. I couldn't tell offhand if any has a patent for the Miller patent alone.

Mr. White: I see. That is all.

Mr. Hoppe: May it please the Court, we offer Plaintiff's Exhibit 18 in evidence.

Mr. White: Object to the introduction in evidence of this exhibit, if the Court please. There is no foundation laid that any of the figures of baleage in the columns on that sheet——

The Court: I think the objection is good.

Mr. Hoppe: Your Honor, that is not put in evidence to show that that is the only machine that they go into, but every bale in there, as the cross examination has brought out, did go through the machine. They may go through other things, [153] too. That is sort of like saying that on a drive from Chicago to San Francisco one does not go through Salt Lake City because he also goes through San Francisco. It does show that these people are using that particular separator in the process. * * * * *

True, there are expedients used. I don't know if your Honor has seen these devices, but these devices are tremendous machines and they have a lot of machinery in them. It is like saying your car does not have a carburetor because it also has a starting motor. Your Honor, seriously, I don't think the objection is good, if that is the basis of it.

The Court: You have offered it solely for the purpose of showing commercial success.

(Testimony of Edouard Thys.)

Mr. Hoppe: That is correct, your Honor, to show that people have used these machines to a certain extent, that a certain percentage of the hop crop in this area goes through those machines. Maybe they go other machines also——

The Court: If that is the only purpose, to show that these machines are used by particular hop growers and a certain amount of hops have gone through the machines, I think perhaps your offer is valid, but if it goes further than that, to [154] show commercial success, the cleaning of these hops and the premium character of the hops that go through, I think the objection would be good, because there are other devices besides these Miller machines that are used.

Mr. White: If the Court please, may I also say this: that the foundation falls short of any proof that any of the people listed on this exhibit actually have used the machine of the patent in suit.

The Court: If you have that objection it is certainly good, because this man knows absolutely nothing about that except through reports that came to him, and they would be purely hearsay.

Mr. Hoppe: Q. Mr. Thys, do you know whether the Bear River Hop Farm at its Durst yard passes its hops through the fishnet type or blower type separator? A. Yes.

The Court: Will you tell me that all the hops listed on that in the name of the Bear River Farm Company went through that machine?

The Witness: Yes.

(Testimony of Edouard Thys.)

The Court: How do you know that?

The Witness: Because there is no other way of routing the hops in the operation.

The Court: You weren't there to see it done, were you?

The Witness: Yes. [155]

The Court: All the hops?

The Witness: I didn't see all the hops pass there, but I know how the layout of the machine is and how the conveyor is built and what the flow of the hops is over the machines.

Mr. White: Every year, Mr. Thys? 1945, 1946, 1947, right through 1951 you saw these machines in operation, you personally—

The Witness: No, but I have received royalties on it.

The Court: But the quality of the hops, you know nothing about that except through somebody's report?

The Witness: Well, they wouldn't pay royalties unless they passed the hops over that cleaner.

Mr. White: I submit that is a conclusion, if the Court please, and not admissible.

The Court: The objection is sustained.

Mr. Hoppe: Q. Mr. Thys, these machines that are used for stripping the hops from the vines and for cleaning them are complete units, are they not?

Mr. White: If the Court please, I object to the question as not relevant to the issues in this case. He is talking about machines for stripping the vines. The issue here is on a separator.

(Testimony of Edouard Thys.)

Mr. Hoppe: I wanted to bring out the character of the machine.

The Court: I think the question is appropriate. Overruled. [156]

The Witness: What was the question?

Mr. Hoppe: Q. These machines that are used to strip the hops and clean the hops and separate the hops from the leaves and the vines, they are large, complete units, aren't they, having separate little pieces of equipment in them?

A. Yes.

Q. Once one of those machines is in existence is it the custom in the trade to change it from time to time? A. Yes.

Q. And when the changes are made have you enough familiarity with the business to know those changes?

A. You mean when anybody makes a change? No, I don't know when everybody makes a change.

Q. Do you check the equipment of your licensees from time to time to investigate it and examine it?

A. Yes.

Q. And during the time that the hop farm of the Bear River people was in operation did you observe any change in the plant, any taking out of the fishnet separator?

A. They have not taken out the fishnet separator.

Q. And is the fishnet separator in the normal line of travel of hops through the machine?

A. Yes.

Mr. Hoppe: Your Honor, I submit that there is

(Testimony of Edouard Thys.)

a presumption that something once in being continues—— [157]

The Court: There is no presumption that the quantity of hops shown there went through the machine.

Mr. Hoppe: Your Honor, we are not saying that this chart shows that the quality of the hops was 2 per cent or 3 per cent——

The Court: How about the quantity?

Mr. Hoppe: This merely shows that these people——

The Court: Counsel, doesn't that chart show the quantity?

Mr. Hoppe: It shows only the quantity, and that is the purpose. It is not the purpose to show the quality. It is simply to show a certain quantity of hops went through the machine.

The Court: The difficulty is that this witness can't testify as to the quantity that went through the machine.

Mr. Hoppe: Your Honor, I submit that he has; he has testified that they use the fishnet separator, he has testified——

The Court: It amounts to this: The inference that all the hops grown on that ranch went through that machine. You can't infer from the quantity that is on this statement that he knows that quantity went through the machine.

Mr. White: Further, your Honor, this is not the best evidence as to any license agreement. They have just a list of names that this witness testified

(Testimony of Edouard Thys.)

are licenses. The license itself is the best evidence as to whether or not—

The Court: This man can testify that a certain machine was used on a certain ranch. [158]

Mr. White: Yes, if he knows.

The Court: But he can't testify as to the quantity that went through the machine unless—

Mr. Hoppe: Q. Mr. Thys, do you know whether the Bear River Hop Farm uses the fishnet type separator? A. Yes, sir.

Q. You have seen it out there? A. Yes.

Q. Do you know whether the Capital Lands use the fishnet type separator? A. Yes.

Q. At Haas Slough House. And do you know whether Sophie Oeste uses the fishnet type separator? A. Yes.

Q. Have you seen it? A. Yes.

Q. Do you know whether Arch Riley uses the fishnet type separator at Westlake—or you call it Ledbetter? A. Yes.

Q. And does E. T. Rooney use the fishnet type separator? A. Yes.

Q. And do Rainier No. 1 and Rainier No. 2 use the fishnet type separator? A. Yes.

Q. And the Horst ranches, do they use the fishnet type [159] separator? A. Yes.

Q. And Mr. Wissemann, does he use the fishnet type separator? A. Yes.

Q. Do you know of any people that use the fishnet type separator other than Miss Oeste who are not licensed from you? A. No.

(Testimony of Edouard Thys.)

Q. Mr. Thys, would you please tell us how you arrive at your royalty rates on your various royalty contracts.

A. The contracts are negotiated, and the fishnet feature—is that what you are asking?

Q. No, in your licensing program in general.

A. Well, in general—well, we have several features that we do license, and some are usually based on a royalty of 50 cents a bale, others 25 cents a bale, but generally when a grower requests a license for several of the patented features, if he wants to use, for instance, the fishnet separator and then the recleaner and the vine grasper, we usually make on that so that the total royalty will not exceed \$1 a bale.

Q. So in a package deal as soon as you reach a ceiling of \$1 they can use as many patents as they want to, is that right? A. Generally, yes.

Mr. White: \$1 a bale?

The Witness: \$1 a bale, yes.

Mr. White: 200-pound bale? [160]

The Witness: 200-pound bale.

Mr. Hoppe: Q. And you mentioned that you have some licensed out at 25 cents a bale. What licenses are those?

A. That is for a vine grasper patent.

Q. And is that the only patent you have ever licensed at 25 cents a bale? A. Yes.

Q. On all your other licenses the license is 50 cents a bale? A. Yes.

Q. Up to a ceiling of \$1?

(Testimony of Edouard Thys.)

A. That has been the general practice.

Q. And all these licenses are negotiated, are they not?
A. Yes.

Q. Have you had any patents issued to you, Mr. Thys * * * on various forms of machinery?

A. I want to qualify the previous question, if I may.

Q. Certainly.

A. That with respect to the portable machine, which is a complete machine, we have a different contract price, which calls for \$3 a bale.

Q. That is on the complete portable hop picker?

A. Yes.

Q. The license is \$3 a bale? A. Yes. [161]

Q. And did you say that you have had patents issued to you? A. Yes.

Q. About how many?

A. Oh, about a dozen.

Mr. Hoppe: You may cross examine.

Cross Examination

Mr. White: Q. Mr. Thys, I didn't quite understand what patent you license for 25 cents a bale. What was that on, what machine?

A. A vine grasper.

* * * * *

Q. That is at the feeding apron?

A. That is the device in which the vine is clamped in order to get it to travel through the machine and subject it to the picking fingers.

Q. That is right at the feeding apron where you

(Testimony of Edouard Thys.)

first put the vine in the machine? A. Yes.

Q. And that is the patent you get 25 cents a bale on? A. Yes.

Q. And who owns that patent, the Horst Company or the Thys Company?

A. The Horst Company.

Q. Do you know the inventor on that? [162]

A. I am the inventor on that.

Q. Isn't it a fact, Mr. Thys, that you also license the so-called cord twine patent for 25 cents a bale? You know the patent for keeping the fingers clean? Don't you also license that at 25 cents a bale?

A. It has been licensed at 25 cents a bale. I don't know that that license has ever been granted by itself.

* * * * *

Q. You stated you had some patents of your own. I will hand you now a copy of your patent 2,138,529 issued in November of 1938, and ask you if you can identify that. A. Yes.

Q. Now, in connection with that patent I will invite your attention to the Miller patent in suit of 2,226,009. You are familiar with both of the patents? A. Yes.

Q. Who owns those patents?

A. The E. Clemens Horst Company. [163]

Q. And the E. Clemens Horst Company owned the Thys patent at the time the Miller application was filed? A. Yes.

Q. Did the E. Clemens Horst Company own the patent application filed by you which matured into

(Testimony of Edouard Thys.)

your patent 2,138,529 at the time it was filed? What I am asking is, did you make an assignment of your invention and your pending application at the time you filed it in 1936?

A. At about the time.

* * * * *

Q. And did the Horst Company own the G. E. Miller invention of the patent in suit at or about the time it was filed in the Patent Office, October, 1939? A. Yes.

Q. Mr. Thys, have you ever had any experience in connection with the construction and mode of operation of farm equipment generally, or has your experience been confined to hop picking and separating units? A. Hop picking machines.

Q. Solely? A. Not solely, but—

Q. The major portion of your experience has been with hop picking machines? A. Yes.

Q. What other experience have you had? You said not solely. What particular experience have you had in the manufacture of farm equipment or the operation of farm equipment?

A. Dusters * * * on automobile chassis. I have done some experimental work on other machines also.

Q. What other machines?

A. Oh, a machine to punch holes in glass to aerate the glass.

* * * * *

Q. On your direct examination you were asked by Mr. Hoppe the various steps that you had made

(Testimony of Edouard Thys.)

in the development of separators, and you referred to the use of a canvas belt, and I asked you—your answer was burlap—you recall that; you used a burlap belt? A. Yes.

Q. Just a flat, rough surface? A. Yes.

Q. And it was disposed on an incline? [165]

A. Yes.

Q. With the upper run of the belt moving in a direction opposite to the movement of the hops as they rolled down, is that correct? A. Yes.

Q. You were also asked by Mr. Hoppe what you meant by the use of the term in your patent No. 2,138,529, particularly—I will find it here in just a minute, your Honor—particularly at page 1, column 2, commencing at line 21, wherein you stated, “This belt may be constructed of a coarse fabric or a comparatively closely woven wire,” and you were asked by Mr. Hoppe what you meant by “coarse fabric.” Did I understand you to say that you meant the canvas or burlap belt of your prior development? A. Yes.

Q. Isn't it a fact that the canvas or burlap belt of your prior development was imperforate?

Q. What?

Q. Imperforate, no perforations?

A. Burlap is loosely woven.

Q. It is somewhat porous? A. Yes.

Q. But it hasn't defined perforations in it, has it? It is not a mesh belt, is it?

A. I don't know. [166]

Q. You don't know? Is that your answer?

(Testimony of Edouard Thys.)

A. Well, I don't know what you mean. You know what burlap is.

Q. Just like a burlap bag? A. Yes.

Q. For sacking potatoes or such as you used in the old Horst patent on the overlapping slats?

A. Such as used in hop kilns.

Q. For what? A. For drying hops.

Q. But it isn't a belt that has a mesh to it such as shown in Figure 2 of your patent?

A. It has a weave.

* * * * *

Q. But it is not a belt of the type shown in Figure 2? A. No.

Q. No. In other words, your definition of a porous fabric, pervious belt, which you gave to Mr. Hoppe as being your old canvas or burlap belt is not what you show in this patent as a porous fabric belt, is it? A. Figure 2?

Q. This one showing a porous belt.

A. That is not a fabric belt. [167] * * * * *

Q. You say on page 1, second column, line 22, that your pervious belt may be coarse fabric, and you show in Figure 2 a mesh belt as an illustration of what you are talking about in your patent application, do you not? A. I don't think so.

Q. You don't think so?

A. I don't know. I don't know exactly what you mean.

The Court: Q. Why don't you understand what he means? Look at Figure 2 * * * and tell me what you mean by Figure 2 in relation to the language

(Testimony of Edouard Thys.)

which you use beginning with line 21 that counsel has referred to.

* * * * *

A. It doesn't say on line 21 that the Figure 2 is a coarse fabric belt.

The Court: Q. Is a what?

A. A coarse fabric belt.

* * * * *

I don't see that language. Line 21 doesn't say that the Figure 2 is a coarse fabric belt. [168]

The Court: Q. Well, Figure 2 is the belt, is it not, the separator belt?

A. Yes, but as I read that, this belt may be constructed of a coarse fabric or a comparatively closely woven wire or like material. Well, that Figure 2 is a wire mesh.

Q. Wouldn't it be a coarse fabric belt, too, of that design?

A. Well, it possibly could, but that is not what I had in mind, a coarse fabric belt.

Mr. White: Q. You don't say anywhere in the patent that Figure 2 is a wire belt, do you?

A. I have to read the whole specification through.

Figure 2 is an enlarged view of a portion of the separator belt.

Q. That is all it says about Figure 2, isn't it?

A. Yes.

Q. Now turning to the claims of this patent, Mr. Thys, particularly claim 1, which is on page 2 commencing at the second column at line 11, is it not true that that claim calls for an endless pervious

(Testimony of Edouard Thys.)

belt without limiting it to a wire pervious belt? In other words, there is no indication in that claim that it be made of wire, is there, that the belt be made of wire? A. No.

Q. In other words, you are claiming both a wire belt and a coarse fabric belt in the claim 1? At least you are attempting to claim both a wire belt similar to Figure 2 and a coarse fabric [169] belt similar to Figure 2, isn't that true? A. Yes.

Q. And in the other claims of this patent, 2, 3 and 4, there is no limitation that the pervious belt be made of closely woven wire, is there?

A. What claims are you referring to?

Q. 2, 3 and 4. You have already talked about claim 1. I am asking you, is there any limitation in 2, 3 and 4 that the pervious belt shall be a closely woven wire belt?

The Court: Counsel, you have read it. There is no such limitation.

Mr. White: All right, there is no such limitation in there. That is all.

Redirect Examination

Mr. Hoppe: Q. Mr. Thys, do you now claim that you are the inventor of the fishnet type of belt?

A. No.

Q. Who was the inventor of that?

A. George Miller.

Mr. Hoppe: That is all.

Mr. White: No questions.

The Court: That is all.

Mr. Townsend: Mr. Wissemann. [170]

WALTER J. WISSEMANN

called for the plaintiffs, sworn.

Direct Examination

Mr. Townsend: Q. Mr. Wissemann, would you tell us your age, please? A. Fifty-four.

Q. And your place of residence?

A. 421 Crocker Road, Sacramento County.

Q. And what is your occupation, sir?

A. Hop farming.

Q. And how long have you been engaged as a hop farmer?

A. In '42 I became vitally interested in hop farming. For the last ten years that is all I have done.

Q. And prior to that time?

A. Home appliance distribution in Sacramento.

Q. What was the name of that firm?

A. Remmick, Jas. S. Remmick Company.

Q. Was that a fairly large business?

A. Yes. Yes. It did a volume of a couple of million dollars a year.

Q. And in 1942 you gave up that business. What was the reason, sir?

A. Because of the war home appliance production went into war production and didn't supply us with merchandise to continue the operation of that business. [171]

Q. Prior to 1942 did you have any interest in hop farming?

A. Yes, I did. I had about forty acres in hops

(Testimony of Walter J. Wissemann.)

for a long period of time, I would say twenty years prior to 1942.

Q. Now, subsequent to 1942 have you had any interest in processing hops? * * * * *

A. Subsequent, yes.

Q. What is your interest in processing hops?

A. Oh, my interest in processing hops is the harvesting of our own production.

Q. By "harvesting" what do you mean?

A. By harvesting the production, picking the hops, cleaning and drying the hops, and baling the hops and placing the hops in a condition for shipment to the breweries.

Q. Do I understand since 1942 you have processed hops for sale, which includes separating the hops from leaves, vines, stems and other foreign materials? A. Yes.

Q. In 1942 what kind of equipment did you have in your equipment?

A. Well, starting in 1942 we didn't have very refined equipment. We had grizzlies in the first part of the machine. We didn't have diamond mesh or fishnet. I would say in 1942 we [172] had a very crude form of hop picking machine that required a large number of operators to handle the output of the hop machine. In 1942 it was basically a very crude machine.

Q. That machinery consisted of grizzlies—which, your Honor will recall, was described by Mr. Miller.

What else did you have in processing the hops in addition, for sale?

(Testimony of Walter J. Wissemann.)

A. Do you want me to describe the travel of a hop through the machine?

Q. As of 1942 in your plant.

A. In 1942 we had picking cylinders. The hop vine was drawn through the picking cylinders and then the hop vine was stripped of all hops and leaves and occasionally lateral arms, and all of this material fell on grizzlies. I presume you know what a grizzly is.

Q. You can redescribe it, Mr. Wissemann.

A. Well, a grizzly is an inclined angle iron, a multitude of them spaced about six inches apart, perhaps a little closer together than that, and what falls through the spaces of the grizzly bars went on into the machine further as the hop was desired, and the matter that did not go through the grizzlies was handled by hand.

Often in hop picking an arm will come off the vine, and the arm will have leaves and hops, and it was necessary in those days when an arm came off or a cluster came off [173] consisting of hops and leaves that the hops be separated from the arm or from the cluster by hand, which originally took a great number of people. I would say that on one—a machine naturally has two sides—I would say that on one side of the machine in 1942, the crude machine was had then, that we worked ten people on each side, perhaps twenty people at the front end of the machine separating the hops from the leaves that came from the picking cylinders either

(Testimony of Walter J. Wissemann.)

in the form of clusters or in the form of arms that were broken off or stripped off of the hop vine.

* * * * *

Q. What other machinery than your grizzlies for separation did you use in 1942?

A. Well, after the grizzly separation, which I would say was a manual separation and, as I told you, took a great number of people, then the hops and the remaining leaves with the hops went up a perforated cylinder, which perforated cylinder was used for a dual purpose. It was used for the distribution of hops to a slat type of separator in the back section of the machine, and anything that didn't go through the perforated holes of the cylinder went out the end of the cylinder into the waste pile.

Mr. Townsend: Your Honor, the materials referred to, the [174] circulating drum has been illustrated already in an exhibit which the plaintiffs presented as Exhibit 7, the escalator type or the slat type separator belt has been referred to and is in evidence as Exhibit 9.

Q. In 1942, then, you had the rotating cylinder, perforated cylinder, and the escalator or slat type separator belt and the grizzlies in operation. Now, was that a satisfactory operation?

A. No. No, it wasn't, because it was costly by way of labor requirement, and we never could get down to the market requirement of a sufficiently cleanly picked hop. The market seems to demand a hop of not in excess of 6 per cent leaf and stem,

(Testimony of Walter J. Wissemann.)

and with that machine as it was arranged in 1942 it was almost an impossibility to get down to the 6 per cent leaf and stem content, which made it difficult for us to market our hops until there were improvements on the machine.

Q. What did you do about that?

A. Well, in 1942 we found that the machine was impractical from the viewpoint of rendering us a sufficiently clean hop, and in 1943 we put in Mr. Thys's diamond mesh, which solved that problem to a degree, and then subsequently we put in the fishnet separation, which I would say was the answer to our problem.

Q. Now, you say after 1942 you put in the diamond mesh? A. Yes. [175]

Mr. Townsend: Incidentally, your Honor, that is referred to in Plaintiffs' Exhibit 17.

Q. Then before you put in the fishnet did you put in the recleaner?

A. Yes. Yes, we had recleaners prior to the fishnet.

Q. I understand in 1944 you put in the recleaner following your use of the fishnet, too?

A. Yes.

Q. I mean of the diamond mesh?

A. Of the diamond mesh.

Q. Is that right? A. Yes.

Mr. Townsend: The recleaner patent is in evidence as Exhibit 4. That is the book of patents, the last patent in that book. That is patent No. 2,138,529.

(Testimony of Walter J. Wissemann.)

Q. So in 1944 you had in use the diamond mesh and recleaner—is that correct?

A. Yes, that is correct.

Q. Now, what happened after that, Mr. Wissemann?

A. After 1944—well, I would say that we had one additional separation in 1944: We had the slat type of separation also on the back section of the machine. Subsequent to that we eliminated the grizzlies and we eliminated the slat type of separation and replaced those two separation devices with [176] fishnet separation.

Q. And when was that?

A. I would say that we started fishnet separation—I am depending on memory now—about 1948.

Q. And was that a rather costly change?

A. Yes. We operate six hop picking machines, and I think that our cost to make that change was about \$20,000 over the six machines, or was \$18,000, approximately \$3000 per machine.

Q. At that time after you had installed the fishnet separator, what was the process at that time after the fishnet had been put into effect?

* * * * *

A. You want me to describe the travel of the hop after the fishnet separator was installed in the machine?

Q. If you will.

A. Well, then the hops were drawn through the picking cylinders, and from the picking cylinders they went to the diamond mesh and from the dia-

(Testimony of Walter J. Wissemann.)

mond mesh they went to the fishnet separation, that is, to the front section of the machine. Then they were elevated to the back section of the machine going through the perforated cylinder which I described previously, and from the perforated cylinder to the fishnet [177] separation again, and then they were elevated and they went through—they went over, rather, the recleaner, and from that state they went into the kilns.

Q. You found this satisfactory?

A. Very much so.

Q. Did the fishnet separator make any difference in your processing of the hops?

A. Well, compared with the original machine I would say the difference would be somewhat like comparing a wheelbarrow to a Cadillac.

Q. What was the end result obtained through the use of the fishnet?

A. We were able to run a considerable volume of hops down to 1 per cent in cleanliness with uniformity between batches.

Q. And prior to that time?

A. We had a most difficult time getting the 6 per cent which was the requirement for the marketing of hops.

Q. And this was occasioned by the installation of the fishnet? A. Yes.

Q. Did you have any savings at all in labor?

A. Oh, substantially, certainly. Prior to the fishnet I told you that the grizzlies required about twenty people manually handling the hops at the

(Testimony of Walter J. Wissemann.)

front section of the machine, and the entire twenty were eliminated as a result of fishnet and diamond mesh. [178]

Q. Now, attributable to fishnet what would you say?

A. I would say probably to the fishnet about half of that saving resulted, somewhere around eight or ten were eliminated from the machine resulting from fishnet separation and another eight or ten resulting from the diamond mesh separator.

Q. Now, we have had some testimony before as to what is meant by premium hops, but I would like you to tell us what you really mean by a premium hop and cleanliness and how you were able to procure more of it.

A. Well, premium on hops—the market pays a premium for the cleanliness of the pick of the hop on leaf and stem. They also pay for a lesser quantity of seed.

Let's describe a seedless hop. A seedless hop is considered as the base price—the base price is 70 cents. At 70 cents it is preferred that the hop shall be 6 per cent leaf and stem and 3 per cent seed. That constitutes a seedless hop. For each 1 per cent less either on leaf and stem or on seed the price is raised one cent.

We are concerned only with the cleanliness in picking, so I said that the hop must qualify at 6 per cent. If it goes beyond 6 per cent in cleanliness the hops can be rejected under the contracts that are generally written as of this time. But for each

(Testimony of Walter J. Wissemann.)

1 per cent of increased cleanliness below 6 per cent one cent premium is paid.

Now, let's say that I was delivering in 1942 a 6 per cent [179] hop at a base price of 70 cents, but resulting from the fishnet separation I was able to deliver a 1 per cent hop. From the five points of increased cleanliness between 6 and 1 per cent, each one of those points meant a one-cent premium, so in effect the price of the hop, the selling price of the hop, had been raised five cents.

Is that clear?

Q. Yes, it is. Now, that is five cents a pound?

A. Yes.

Q. And how many pounds in the average bale?

A. 200.

Q. Thank you very much, Mr. Wissemann—oh, excuse me. Mr. Wissemann, what is the extent of your operation in terms of acreage?

A. Well, in 1951 we operated 336 acres. We added 40 acres for the 1952 crop, and we now are operating 376 acres.

Q. Could you tell us, if you can, what your rank in terms of size of producer in this Sacramento Valley is? * * * * *

A. I don't know. I know on the witness stand I have no right to ask Mr. Thys, but for an individual operation not incorporated I think we are the largest acreage growers operating as an individual in the State of California. Now, that is my belief. [180]

Mr. Townsend: Thank you, Mr. Wissemann. All right, Mr. White.

(Testimony of Walter J. Wissemann.)

Cross Examination

* * * * *

Mr. White: Q. In 1942 you had how many operations again for the cleaning of hops?

A. In 1942 we had the—as I said, we had the picking cylinder, we did not have the diamond mesh, and then we had the grizzlies which I described to you.

Q. Yes.

A. And then we went to the perforated cylinder and from the perforated cylinder to the slat type of separation. * * * * *

Q. In other words, the operation was from the picking finger cylinders through a grizzly?

A. To the grizzly underneath the picking cylinder, yes.

Q. Underneath the picking cylinder?

A. Yes.

Q. Then to the overlapping slats?

A. Then the hops were raised on an elevator to the perforated [181] cylinder.

Q. Oh, the perforated cylinder?

A. Then we went to the slat separator.

Q. Then what did you do after the slat type separator? I mean in the cleaning operation, did you have any other operation after the slat type separator? A. No, we didn't.

Q. All right. What did you do in 1943?

A. In 1943 we did, we had the recleaner at the tail end of the machine the way we started originally.

(Testimony of Walter J. Wissemann.)

Q. All right. Then in 1942 you had the grizzlies through the perforated cylinder——

A. Right.

Q. ——elevated up to the top of the cross-slat separator——

A. Well, of course, first we elevate to get to the perforated cylinder.

Q. And then down to the cross-slat separator?

A. That is right.

Q. And then to a recleaner?

A. That is right.

Q. That is the Thys recleaner? A. Yes.

Q. That was in 1943. Did you do that in 1944, too?

A. I think we dispensed with that operation; we got into the diamond mesh as quickly as we could. I think we did that in [182] 1942, and in 1943 we put the diamond mesh in.

Q. All right. In 1942 and 1943 you put the diamond mesh in, so your operation was, then, after the picking cylinder had completed its work they dropped through this diamond mesh? That is that big quadrilateral diamond mesh screen?

A. Yes, it is a flat screen.

Q. A flat screen, and it is continuously moving about the entire machine? A. That is right.

Q. And that does some separation?

A. Yes.

Q. And then you go from there and you elevate the material up to the——

(Testimony of Walter J. Wissemann.)

A. Are you talking about the machine as it existed in 1942 or——

Q. 1943 and 1944.

A. Then we went to the grizzlies.

Q. All right. From the grizzlies then you elevated up to the perforated cylinder?

A. That is right.

Q. And then down to your cross-slats?

A. Yes.

Q. And at that time you stopped, or did you then go——

A. Then we went to a Thys recleaner.

Q. Right after the cross-slats? [183]

A. That is right.

Q. So you had five operations there?

A. Yes.

Q. Then in 1944 when you first put in your fishnet proposition you had the step of going from the cylinder through the diamond mesh—you cut out the grizzlies, did you? A. Yes.

Q. You just went through the diamond mesh?

A. Yes.

Q. And elevated it up to the distributor or perforated cylinder? A. Yes.

Q. And then dropped it down to the fishnet separator?

A. No, we still had the slat type separator.

Q. I am talking now about when you went to the fishnet. A. Oh. Oh.

Q. What did you do then?

(Testimony of Walter J. Wissemann.)

A. It went from the cylinder to the diamond mesh to the first separation by fishnet.

Q. Elevated——

A. Elevated on the conveyor belt to the perforated cylinder and then back to the second separation by fishnet, and then to the recleaner. [184]

* * * * *

Q. How many operations of cleaning are there? Just number them. One is the diamond mesh?

A. The diamond mesh.

Q. Two? A. Two is the fishnet.

Q. Yes.

A. Three is the perforated cylinder, four is the fishnet, five is the recleaner.

Q. Five operations. Now, let me ask you this, Mr. Wissemann: In 1943 or prior to the time you had the fishnet and when you had the cross-slat type——

A. Yes.

Q. ——did you go to a recleaner after that?

A. Yes, we had a recleaner on it initially.

Q. Now let me ask you this, then: Did you go from the cross-slat separator up, elevated up to a perforated cylinder and then back to the cross-slat again?

A. No. I am not making this clear for you. May I?

Q. I am just asking you this one question now: When you had the cross-slat separator did you do two operations on that or merely one?

A. One.

(Testimony of Walter J. Wissemann.)

Q. Did you ever try to do it on two operations as you did with the fishnet? Did you ever try to go through the cross-slat up to the perforated cylinder and back to the cross-slat [185] and then to the recleaner?

A. Yes, we experimented with the slat type separation. We found that it was much less effective than the fishnet.

Q. You aren't answering my question.

A. I am sorry.

Q. In this sense, Mr. Wissemann: You say now that you run the separation once over the fishnet and then up to the perforated cylinder, and the second time over the fishnet? A. Yes.

Q. My question is, did you ever try that same series of operations when you had the cross-slats?

A. With the cross-slat we tried two cross-slat separations. Yes, we did.

Mr. White: In other words, in every instance you had five steps of separation. That is all.

Redirect Examination

Mr. Townsend: Q. Mr. Wissemann, Mr. White asked you, did you try two cross-slat operations, and you said yes. What was the result?

A. Well, as I told you, we had difficulty in getting the hops down below 6 per cent.

Q. Was the use of two cross-slat belt operations a success? A. No.

Q. As I understand your testimony, Mr. Wisse-

(Testimony of Walter J. Wissemann.)

mann, when you put in the fishnet you succeeded in securing your 1 per cent [186] premium——

A. That is right.

Q. ——hop? A. Right.

Q. Through the use of the fishnet?

A. It is very efficient. It is the answer to separation of leaves from hops.

Mr. Townsend: Thank you very much.

Recross Examination

Mr. White: Q. Mr. Wissemann, what was the percentage of cleaning that you got when you put the hops through the slat type separator——

A. We had——

Q. Wait a minute. ——only once?

A. Only once?

Q. Yes. What percentage of cleaning did you get?

A. Well, originally when we had one of the slat type separators we could not hit 6 per cent, we couldn't get cleaned down to the 6 per cent. I think then in 1943 or whenever it was, it ran around 8 per cent.

Q. I don't think you understood my question. I am asking you, Mr. Wissemann, what percentages of hop cleaning did you get in terms of percentage when you operated by only going across the slat type separator once during your cleaning operation?

A. Do you want me to answer that question percentage of [187] cleanliness?

Q. Yes. A. I would say about 8 per cent.

(Testimony of Walter J. Wissemann.)

Q. All right. What percentage of cleanliness did you get when you went through the slat type separator twice?

A. I would say we lowered to 6 per cent.

Mr. White: That is all.

* * * * *

EDOUARD THYS

recalled for the plaintiffs, previously sworn.

Direct Examination

Mr. Hoppe: Q. Mr. Thys, I hand you Plaintiffs' Exhibits 16 and 16-A for identification and ask you if you can state what they are.

A. They are the fishnet belt separator at the Oeste ranch.

Q. And are they actually pictures of the machines at the Oeste ranch? A. Yes. [188]

Q. Is that what the machine looks like?

A. That is what the machine looked like when those pictures were taken.

Q. And were you present when the pictures were taken? A. Yes.

Mr. Hoppe: We offer Plaintiffs' Exhibits 16 and 16-A in evidence.

Mr. White: Just a moment. Just a moment. I would like to ask Mr. Thys a few questions.

Q. Mr. Thys, you went out to the Oeste ranch in August of 1950. That is in the record in this case. Do you recall going out there in August, 1950, the first time? A. No.

(Testimony of Edouard Thys.)

Q. The first time you went out to the Oeste ranch you didn't take any photographs?

A. No.

Q. Then the second time you went out—when were those photographs taken?

A. They were taken after the harvest of 1951.

Q. After the harvest of 1951. In other words, you went out after you made your answers to the defendant's interrogatories? You remember answering the interrogatories? Do you remember my submitting a lot of questions to you? A. Yes.

Q. And you answered them, and you said at that time you had [189] no photographs or blueprints or drawings of the defendant's machine. Do you remember that?

A. No, I don't remember that.

Q. Well, at all events, these photographs were taken after the 1951 season? A. Yes.

Q. And the photographer was Mr. Greer?

A. He was the photographer from the McCurry Photo. I don't remember his name.

Q. And were you present when he made these photographs? A. Yes.

Q. Can you state from these photographs, Mr. Thys, wherein the machine depicted in these photographs differs from the machine of Mr. Wissemann, who testified this morning?

A. The fishnet belts are substantially the same.

Q. In other words, these may be photographs of Mr. Wissemann's machine? A. They are not.

The Court: They will be received.

(Plaintiffs' Exhibits 16 and 16-A for identification were received in evidence.)

Mr. Hoppe: May it please the Court, we also offer in evidence the defendant's answer to interrogatory No. 6.

Interrogatory 6 is as follows: "As to the so-called stationary hop picking machine located on the hop ranch of the [190] defendant near Elk Grove, Sacramento County, California:

"(a) State the date when work on said machine was first commenced to construct the same.

"(b) State the date when the machine was first put into operation."

The answer, which we offer in evidence, is: "6(a). The answer to interrogatory 6(a): The work on defendant's aforesaid machine was first commenced in the fall of 1944.

"6(b). The answer to 6(b): The defendant's machine was first put into operation in August, 1945."

The plaintiffs rest, your Honor.

MOTION TO DISMISS

Mr. White: If the Court please, at this time the defendant makes an oral motion to dismiss this action on the complaint filed herein on the following grounds:

That the evidence adduced on the part of plaintiffs, particularly by the patentee and alleged inventor, Mr. Miller, establishes that the disclosure

of this patent is indefinite, incomplete, not clear, and not in accordance or in conformity with Revised Statute 4888 or 35 USCA 33.

Mr. Miller testified that the object of his invention was to separate hops from waste material entirely upon the surface of the fishnet belt. He testified a number of times that the entire operation was performed in his machine on the top [191] surface of that fishnet belt. The only function of the perforations was to let the blast of air go through.

That point or feature was not before the Patent Office.

Further, the patent teaches that the purpose of the invention is to permit small stems and leaves, small portions of leaves, to pass through the meshes of this net, and it goes on to specify that the mesh of the net for this purpose must be slightly smaller than the average hop.

That is set out, if the Court please, on page 2, first column, lines 12 to 15 inclusive, in this language: "The meshes of the net are fairly large, but they are slightly smaller than the average size of the hops to be separated."

Now, on page 2, second column, line 10 and following, we find these words: "Some stem sections are almost straight and comparatively short. These when deposited on the netting material will fall between the meshes into the fan housing and will be blown up." In that case he is talking about the first two showings of Figure 1 and—particularly the machine of Figure 1, not of this particular modification which is now on the easel.

A little further on, the second column of page 2, starting at line 35, he explains the meshes in the net as follows: "It should also be noted that the net is woven to produce an elongated diamond mesh. This produces elongated openings through which small straight stems can readily fall." [192]

A little further along on page 2, commencing at line 70, Mr. Miller states in his patent: "Small stem sections will drop through the meshes forming the netting, while larger stems will become hung up."

At line 75, second column, he says: "The stems falling through the netting material are raised by a conveyor 51 which discharges into conveyor 50."

Yet he stated on cross examination a number of times that all of the separation takes place on the upper run of the fishnet belt, nothing falls through. The perforation serves to pass the air from the air blast or blower.

Furthermore, there is no disclosure in this patent in suit that this machine is merely for a preliminary cleaning machine or operation and that a recleaning machine is necessary.

Mr. Miller testified that he had various processes of effecting the cleaning of hops. That is his testimony, but in the patent he doesn't say that there are three cleaning operations in order to get this clean hop.

On the face of such testimony by Mr. Miller it is tantamount to a disclaimer of the very point of novelty which he asserts in the claims of the patent.

For example, in the last clause of claim 1 he states: "The mesh in said netting material being

slightly smaller than the hops to be separated, to permit the hops to roll down [193] the inclined surface presented by the netting material, the mesh in said netting and the cross-slats retaining the leaves and larger stems but permitting the smaller stems to fall through the mesh of the netting material.”

The point of novelty being somewhat indefinite as to the size of those meshes, and at no place does Mr. Miller state in his patent the size of the mesh and the size of the hops to be separated, but he uses the indefinite term, “slightly smaller than the average hop.”

There is no teaching. And if you will recall Mr. Miller’s testimony when he said Mr. Rooney two years ago took a license under this patent, you recall that he said, “Mr. Rooney came to me to ask me the size of the mesh.”

In other words, there is no teaching in this patent as required by Revised Statute 4888 or 35 USCA 33, to anyone skilled in the art of hop cleaning—

The Court: Isn’t it sufficient to relate it to the hop?

Mr. White: If the size of the hop were stated in there, it may be worked out by experiment, but the point is—

The Court: It is determinable.

Mr. White: It is determinable by experiment, if the Court please. The patent is addressed to those skilled in the art, and yet we have a hop grower like Mr. Rooney—

The Court: I don't know, but I assume hops grown in one place may on the average be larger than those grown elsewhere. [194] It is a variable matter.

Mr. White: It is a variable matter, but yet Mr. Rooney, an experienced hop grower, had to go to Mr. Miller personally and ask him how or what size mesh to make.

The Court: My point is it can be determined by the size of the hops grown.

Mr. White: But the point of novelty in this patent—

On that point Mrs. White called my attention to the case of *Swift & Sons vs. Coe Manufacturing Company*, 102 Fed. (2d) 391, wherein the Court stated the rule in these words:

“However, the plaintiff's witness, Donald D. Swift, the alleged patentee, testified that he did not know and could not give the proportions of yellow ochre used to produce the results he claimed for his invention. If evidence had been offered by the defendant and had been objected to by the plaintiff tending to show that the amount of yellow ochre in the outer sizing was not concisely and exactly stated in his patent, it would have been inadmissible. But no objection was made to the statement by Swift, the patentee, which appears in his own testimony as follows:

“ ‘In order to vary the pigment in the outer sizing in accordance with the tone of the gold of the metal layer, in order to obtain the invention of the patent in suit, there is still the additional factor, namely,

that the proportion of that yellow ochre in the outer sizing must be in sufficient quantity [195] to carry out those results, namely, to compensate for the irregularities of the metal'."

In other words, the Court distinctly pointed out there that if that is left to experimentation the disclosure is not complete, inadequate, and the patent therefore is invalid.

The point here is that Mr. Miller in his patent does not teach the size of the openings, he does not teach the size of the hop. That requires experimentation and it requires people to come to him to determine the size of the mesh of the net in order to to build a machine of the patent in suit.

Now, Mr. Miller has testified at complete variance with the teachings of his patent. In eight places in his patent he has spoken of making the size of the mesh sufficiently large to permit the small stems to pass through the openings and they will fall on the conveyor 51 and take off on conveyor 50, but on the witness stand he testifies, "No, that is not true. All of the separation takes place on the upper run of the belt."

As a preliminary or preamble to the description of the patented machine he refers to the Thys patent No. 2,138,529, and he construes that Thys patent and states in the preamble that the Thys wire mesh screen is not satisfactory because there is not sufficient area on small stems for the suction device to pull them through the mesh, so they roll down with the hops. "Now," he says, "I accomplish and get better results than the wire mesh because I make

my mesh openings slightly [196] smaller than the average hop so that these small stems will not roll down the incline and they will pass through the mesh to the underlying conveyor.”

Yet, contrary to the teachings of his patent, he describes his commercial machine and he flatly says, “No, all the separation takes place on the upper run of the conveyor. Everything takes place there. The perforations permit the passage of air. The belt is pervious only to the blast of air.”

Now, the Patent Office has never had an opportunity to examine those claims with that disclaimer of Mr. Miller.

This Court cannot pass on the validity or the question of infringement of those claims when Mr. Miller himself flatly disclaims the very point of novelty that he asserts in his specifications, and the Patent Office should be given an opportunity to determine the novelty of the combination or alleged combination with that portion of it which has been disclaimed out of those claims.

In short, if the Court please, this patent is conceded by the patentee Miller to be void on its face, as failing to meet the test of a combination patent where all the elements are admitted to be old, by not specifying any function by reason of the fact—You will recall that I went over this matter of each and every one of those elements with Mr. Miller very carefully of every claim. He conceded not only that each of the elements of the patent was old, but also conceded that the [197] function of each of the elements of the patent was old, and

when I asked him what new function was accomplished by the co-action or alleged co-action of these elements, he said he had no new function of co-action other than the netlike surface of the upper run belt, and he went further than that and qualified that by saying that nothing goes through the belt, all the separation takes place on the upper run. A complete variance from the very point of novelty which he asserted in the Patent Office and which he claims in these three claims of his patent.

Your Honor has intimated you are familiar with the decision in the Great Atlantic-Pacific Tea Company case vs. Supermarket, 71 Supreme Court 127, "Where there is no additional function in a combination or aggregation of claims, then in the summation of the individual functions of elements of such claims there is no meeting of the test or standard of invention and the patent is void on its face."

I submit, if the Court please, on the question of invalidity the motion to dismiss should be granted.

The Court: Mr. White, I have to say to you that I think there are very grave and important problems raised by what you have stated in your motion. My disposition would be to hear all the evidence you have and take up this point at the conclusion of the evidence. I prefer to do that to passing on this motion now. I prefer to delay the ruling on the motion [198] until the completion of all the evidence.

Mr. White: All right, your Honor. There is only one other point, but I will pass it, if the Court please, if you prefer I do that.

The Court: Of course, we are all familiar with the Great Atlantic-Pacific Tea Company case.

Mr. White: Well, just for the record, if the Court please, I would like to complete this one last stage of the motion, and that is on the point of infringement. The motion to dismiss is predicated also on the total failure of these plaintiffs to prove infringement of the claims of the patent. The evidence submitted by the plaintiffs on that point is not a comparison of the defendant's accused infringing machine with the claims of the patent. Mr. Miller's testimony is a comparison between a commercial device built by Mr. Miller and the accused machine rather than a comparison between the claimed functions and the accused machine, and on that point, if the Court please, you will recall again that Mr. Miller merely testified that his machine was built with a certain sized mesh and that nothing fell through the upper run of the machine whatsoever. So the proof of infringement is totally lacking here and the plaintiffs have not sustained their burden of proof in that respect.

The Court: My ruling is I will defer a ruling on this motion until the conclusion of the case. [199]

Mr. White: All right, your Honor.

I would like to call Mr. Doble.

WILLIAM A. DOBLE

called for the defendant; sworn.

Direct Examination

Mr. White: Q. Mr. Doble, what is your occupation, please?

(Testimony of William A. Doble.)

A. My occupation is that of mechanical consulting engineer, specializing principally in patent matters.

Q. And what has been your education in connection with your occupation?

A. My education in connection with my occupation has been that of mechanical engineering, and I am qualified as a professional engineer in the State of California, No. 4951.

Q. What has been your experience, if any, in connection with patent infringement suits, Mr. Doble?

A. I have prepared and experted approximately thirty patent suits.

Q. Have any of those suits involved the construction and mode of operation of machines?

A. Yes, practically all of them.

Q. Practically all of them. You have had experience, then, in conjunction or connection with the construction, assembly and mode of operation of machines and their component elements, is that correct? [200]

A. That is correct.

Mr. Hoppe: Mr. White, there is no question about qualifying Mr. Doble as an expert witness.

Mr. White: You stipulate to his qualifications as an expert?

Mr. Hoppe: Absolutely.

Mr. White: Q. Mr. Doble, are you familiar or have you familiarized yourself with the patent in suit?

A. Yes, sir, I have.

(Testimony of William A. Doble.)

Q. And have you examined the file wrapper of the patent in suit? A. Yes, sir.

Q. Are you familiar with the prior patents set out in the answer of the defendant in this suit?

A. Yes, sir.

Q. You have examined each and every one of those patents? A. I have.

Q. Mr. Doble, with particular reference to claim 3 of the patent in suit and to which I would like to have you refer at this time, have you studied and found in any of the prior patents cited by the defendant an element defined in this claim as "a pervious separator belt composed of textile netting material having a diamond shaped mesh slightly smaller than the size of the hops to be separated?" That is claim 3, the first element. [201]

A. The first element, I cannot answer your question directly, because the first element is incomplete and indefinite in what is meant by "slightly smaller." I do find in the prior art a pervious separator belt composed of textile netting material having diamond shaped mesh.

Q. When you say you found that in the prior art, do you mean in prior patents?

A. Yes, sir.

Q. And what prior patents did you find such elements to be present in?

A. In the Thys patent—the Thys patent No. 2,138,529.

* * * * *

(Testimony of William A. Doble.)

Mr. White: Q. When you refer to this Thys patent you are referring to the patent which is already in evidence as Plaintiffs' [202] Exhibit 4.

* * * * *

A. Yes.

Mr. White: Q. Now, where do you find specifically, Mr. Doble, the first element of claim 3 in the Thys patent to which you referred?

A. I refer to Figs. 1 and 2. Fig. 1 is a side elevation of the machine and shows the pervious belt spanning three spaced sprockets, and Fig. 2 illustrates a large perspective view of a portion of the separator belt.

Then referring to the specification, page 1, column 2, line 21, "This belt may be constructed of a coarse fabric or a comparatively closely woven wire or like material."

Q. So, you find, then, in the Thys patent a description of the pervious belt of the Thys patent illustrated in Fig. 2 in the second page of the patent, column 2, commencing at line 21—or page 1, rather, column 2, commencing at line 21, that that illustration is an illustration of a pervious belt of textile material, is that correct? A. That is correct.

Q. And having a diamond shaped mesh?

A. Yes, it has a diamond shaped mesh, as clearly illustrated in Fig. 2. [203]

Q. Now, did you find that element in any other prior art patent?

A. I would like to refer to the patent to Scott,

(Testimony of William A. Doble.)

1,107,207, and point out particularly the diamond shaped screen or mesh shown in Fig. 5.

* * * * *

The Court: That is a part of Plaintiffs' Exhibit 4.

* * * * *

Q. All right, proceed, Mr. Doble.

A. In the specification the diamond shaped netting as shown in Fig. 5 is referred to in the following language: "In accordance with my invention I provide a special screening surface for the body of the separating drum 24. This consists of a pliable netting of fibrous strands such as the cord netting shown in Fig. 5. I may make use of an ordinary seine or fish net, but in order to make use of a heavier thread I prefer to make a net by using large sized cord crossed at suitable intervals to form the correct size of opening and staple the cords together instead of knotting them."

Then referring to page 3 of the specifications, in the first column, starting at line 7: "The shape of the openings may be varied if desired by stretching the net and [204] refastening it by means of the pins. For lima beans an aperture elongated in one direction and contracted in the other is a better shape than a round hole, since the lima bean itself is elongated. Another advantage of the netting is that if the aperture is slightly smaller than the pea berry, the pressure of the vines upon the peas will force them through openings bounded by the pliable cords whereas the containers or pods are held back

(Testimony of William A. Doble.)

by the netting. The netting is also much cheaper than perforated rubber and more economical.”

Q. Now, Mr. Doble, this Scott patent that you have just read from relates to a green pea, bean and cowpea huller, is that correct?

A. That is correct.

Q. In your opinion is the device illustrated in Fig. 5 a separator? A. Yes, sir, it is.

Q. And it is a pervious separator?

A. It is.

Q. In your opinion is there any distinction between separating green peas, beans and cowpeas on the one hand and separating hops and leaves and stems on the other hand?

A. No, they both do a separating operation. One separates the berries from the pods, and the other separates the hop fruit from the leaves and stems.

Q. In that connection, Mr. Doble, I invite your attention to [205] Plaintiffs' Exhibit 2, which is the file wrapper of the patent in suit, particularly at page 14 of that file wrapper, and ask you whether or not you have examined that particular page before. A. Yes, sir, I have.

Q. And with particular reference to the first paragraph of the Examiner's statement there, would you say that the separating belt, pervious separating belt, shown in Scott performs the same function in the Miller patent as it does in the Scott patent?

A. Yes. The two claims, original claims, in the application of the Miller patent were directed primarily to the particular form of fishnet belt and

(Testimony of William A. Doble.)

were rejected by the Patent Office on the Scott patent, and the rejection was concurred in by Miller in canceling those two claims.

Q. This particular Office action at page 14 refers also to a Thompson patent No. 1,583,201. Have you examined that patent, Mr. Doble?

A. Yes, sir, I have.

Q. And do you find any separating belt in the Thompson patent of any character?

A. Yes, sir, and I refer to the figures of that drawing, especially Figs. 2, 5 and 6. Now, Fig. 6 clearly shows a diamond shaped separator belt for the purpose of separating large potatoes from small potatoes, or vice versa. [206]

Q. In your opinion is there any difference in so far as function is concerned if a fishnet type belt were substituted in the Thompson device for the screen shown in Fig. 6 of that patent?

A. I don't believe it would make any difference in the mode of operation. It would operate in just the same way.

Q. Did you find in any of the other prior patents cited by the defendant an element of a pervious separator belt composed of textile netting material having a diamond shaped mesh? Or is that all of the patents that you found such element in?

A. That is all I can remember at this time. There are some that don't have a diamond shaped mesh, have an elongated mesh, which would be an equivalent. In fact, it may even be better.

Q. It might even be better?

(Testimony of William A. Doble.)

A. Open up the spaces for more of the stems to drop through. * * * * *

Q. You are familiar, are you not, Mr. Doble, with the Horst patent 1,054,551? Have you a copy of that before you? A. Yes, sir. [207]

* * * * *

Q. I call your attention to the disclosure of this patent at lines 41 to 46 inclusive of column 1, page 1, and ask you whether or not the inclined cylindrical separator referred to in that patent performs the same function as the fishnet or pervious separator belt of the Miller patent in suit.

* * * * *

Does that particular element of an inclined cylindrical separator function as a separator to separate the hop clusters from stems and vines?

A. Yes, it does. [208]

Q. And portions of leaves? A. Yes.

Q. And in that connection is it your opinion that it performs the same function as a pervious belt?

A. To that extent of separating the hops from the leaves.

Q. Are you familiar, Mr. Doble, with the Hoffeld patent No. 2,115,107? A. Yes, sir.

Q. Do you find any separating element in that patent for separating valuable material from invaluable material?

A. Yes, sir, I do, and such a structure is clearly illustrated in Figs. 2 and 5.

* * * * *

(Testimony of William A. Doble.)

Mr. White: Q. All right, Mr. Doble, you have just [209] referred to Fig. 2 and Fig. 5 in this patent.

A. Yes, sir.

Q. The question is whether an element is illustrated in either one of those views and mentioned in the specification of this patent which has the function of the pervious textile belt composed of textile mesh material mentioned in Figs. 2 and 5 of the patent in suit.

A. That separator belt is indicated by the figure 3—by the numeral 3 in Fig. 5. That is not a textile belt in the sense that it is not a fishnet; it is made of metallic strips, but it serves the same function, to separate the kernels of the corn from small pieces of the cob and the silk of the corn. As shown in Fig. 5, the silk and small particles drop through the pervious belt and are collected in a waste receptacle placed between the two runs of the belt.

Q. While we are on this Hoffeld patent, Mr. Doble, you referred to claim 3. I call your attention to the second element of claim 3, second column, page 3, line 40: "Means for disposing the belt on a sufficiently steep incline to cause the hops deposited on the surface of the belt adjacent the upper end thereof to roll down the incline and off the belt." Now, do you find in this Hoffeld patent any element that functions similar to the element that I have just read from claim 3?

A. Yes, it performs the same function exactly. As shown in [210] Fig. 5, the elements to be separated are deposited from a hopper to the upper

(Testimony of William A. Doble.)

end of the inclined belt 3 and the corn which is to be saved rolls down the belt and is finally received in the hopper below the lower end of the belt, while the corn silk, corn husk parts and other foreign material are conveyed upwardly by the belt over the top pulley and deposited to the rear of the conveyor or separator belt.

Q. Your answer to that last question, Mr. Doble, anticipates the next element, which reads, "Means for imparting continuous movement to the belt in a direction opposite to the rolling hops." As I understand your testimony, then, that motion is imparted to this belt there in the direction opposite to the direction of the falling corn, is that correct?

A. That is correct.

Q. Is there any difference in function between the operation of the inclined separator belt there, the Hoffeld patent, and the inclined separator belt of the Miller patent—

A. No.

Q. —in your opinion?

A. It is just the same, substantially—

The Court: I cannot apprehend why you go into this. Your opponents have conceded these are old elements.

Mr. White: My point is, if the Court please, while the plaintiffs have conceded that they are old elements, they have not quite conceded, as I understand it, that the function [211] of each of these old elements is the same as the prior art and that the co-action of the entire assembly is a summation of individual elements of separate functions.

(Testimony of William A. Doble.)

The Court: All right, go ahead.

Mr. White: Q. One other element in this claim, Mr. Doble; it is the last clause, "Means for maintaining a continuous flow of air through the belt with sufficient velocity to cause leaves and the like to adhere thereto."

In that Hoffeld patent before you do you find any such element in that Hoffeld patent?

A. Yes, I do. Again referring to Fig. 5, in that figure there is diagrammatically illustrated a propeller for blowing a blast of air and a funnel 26 for directing that blast of air against the upwardly traveling separating belt so that the air will tend to hold the foreign material onto the belt as it travels upward so that that material can be deposited to the rear of the belt while the valuable material, that is, the kernels of corn, travel down or roll down the screen and are deposited in a hopper below the lower end of the screen.

Q. So from your testimony, Mr. Doble, you have found in the prior art identical elements performing the same identical functions that each of the elements of claim 3 perform, is that correct?

A. That is correct.

Q. In your opinion, Mr. Doble, is there any function performed [212] by the assembly of these elements of claim 3 in addition to the summation of the functions of each individual element?

A. No. They all add up to the same answer. There is nothing startling, nothing beyond the addi-

(Testimony of William A. Doble.)

tion of one element to another element to make up the assemblage of parts.

Q. There is no co-action between the pervious separator belt, for example, and the means of maintaining a continuous flow of air which would give any added function to this assembly than is performed by a similar assembly in the prior art, is that correct? A. That is correct.

Q. There is no co-action between any other element of claim 3 with a different element which performs some different function than that performed by the similar element in the prior art?

A. That is correct. [213]

* * * * *

Mr. White: Q. Mr. Doble, we had completed the claim 3 of the patent in suit, and I invite your attention now to claim 2 of the patent in suit, which is on page 3, column 2, commencing at line 7. After the preamble there is the first element, "A pair of spaced endless sprocket chains."

In your opinion does the pair of spaced endless sprocket chains perform any function in this assembly of claim 2 differently or different than it did in the prior art patents?

A. No, it does not.

Q. The second element is, "Upper and lower pairs of sprocket gears to support the chains."

Do those upper and lower pairs of sprocket gears perform any different function in the assembly of claim 2 than they did in the prior art patents?

A. No, sir, they do not. [214] * * * * *

(Testimony of William A. Doble.)

Q. In Plaintiffs' Exhibit 5, Fig. 1, will you state whether there is any difference between the machine depicted in Fig. 1 and the machine depicted in Fig. 1 of prior patent to Thys No. 2,138,529.

A. I find no material difference. One seems to be a very close copy of the other, and, as Mr. Miller states, I believe, in the specification.

Q. You find in this Fig. 1 of Thys patent, which I just referred to, a pair of spaced endless sprocket chains, upper and lower pairs of sprocket gears to support the chains, do you not? A. Yes, sir.

Q. You also find in the Thys prior patent which I have just referred to cross-bars connecting the chains, do you not?

* * * * *

A. Yes, I do.

Q. Incidentally, Mr. Doble, do you have with you the prior patent to Horst, No. 1,488,249, which has been referred to as—

The Clerk: Plaintiffs' Exhibit 13. [215]

Mr. White: Q. —which is Plaintiffs' Exhibit 13 and which has been referred to in this testimony as the so-called cross-slat patent?

A. Yes, sir, I have the Horst patent which you have referred to as Plaintiffs' Exhibit 13 before me.

Q. Have you examined that patent and are you familiar with the machine and its mode of operation? A. Yes, sir.

Q. Do you find in that prior patent to Horst a pair of spaced endless sprocket chains, upper and

(Testimony of William A. Doble.)

lower pairs of sprocket gears to support the chains, and cross-bars connecting the chains?

A. Yes, sir.

Q. In the Miller assembly of claim 2 do those three elements I have just mentioned perform any different function than they perform in the prior Horst patent 1,488,249?

A. No, sir, they do not.

Q. Now, you have also testified in connection with claim 3 with respect to the next element of claim 2, which refers to a separator belt composed of netting material woven from textile cord supported by the cross-bars. You recall you testified with respect to that element already?

A. Yes, I have, Mr. White.

Q. Your testimony is you find that in the prior art, particularly in the Thys patent? [216]

A. Yes, sir.

Q. Which we have just referred to—

A. Yes.

Q. —which is the last patent in Exhibit 4, No. 2,138,529.

Now, there is a qualification in this claim 2 of the patent in suit, Mr. Doble, commencing at line 14 of the second column at page 3 which reads as follows: "Knots formed at the points where the cords intersect each other to form the meshes of the netting material."

Do you find any pervious textile belt of that character in any of the prior art patents? Inviting your

(Testimony of William A. Doble.)

attention specifically as to the qualification of knots formed at the intersections.

A. Yes, sir. In the Thys, which is the last patent in Plaintiffs' Exhibit 4, and the Scott patent.

Q. No. 1,107,207?

A. Yes, sir. Scott states——

Q. Doesn't he state that he staples the cords together at the intersections instead of knotting them?

A. Yes, that is correct. He recognizes that they could be knotted, but his preference is instead of using knotted netting he uses staples instead.

Q. Are you familiar with the ordinary, common fishnet, Mr. Doble? A. Yes, sir. [217]

Q. Do those common, ordinary fishnets have knots at the intersections of the cords?

A. They do.

Q. What is the function of that knot at the intersection of the cords in the ordinary fishnet?

A. To keep the strands or strings of the net together, locked together properly.

Q. Do the knots project any distance up above what would be a plane in the net itself?

A. Yes, they do.

Q. And what function do those knots have in connection with the adherence of material to that net?

A. The knots projecting above the net would tend to cause material to adhere to the surface of the net.

Q. Is that an obvious or unexpected function of the knots? Which is it, obvious or unexpected?

A. It is obvious; it is inherent.

(Testimony of William A. Doble.)

Q. It is inherent in the fishnet itself?

A. Inherent in the fishnet itself.

Q. Now we come to the next element of this claim, which is at line 16, column 2 of page 3: "Cross-slats disposed on top of the netting material and securing said material to the cross-bars."

Do you find any such element in the prior art patents which have been cited by the defendant, Mr. Doble? [218] A. Yes, sir, I do.

Q. And will you look at the particular patents which you have found such element in and call them to the attention of the Court?

A. I will refer to patent to Hamachek, 1,153,304.
* * * * *

Mr. White: Patent to Hamachek, if the Court please, 1,153,304. * * * * *

I would like to offer that in evidence— * * * —as the defendant's exhibit next in order.

(The document referred to was marked Defendant's Exhibit A.) * * * * *

Q. All right, Mr. Doble. [219]

A. Referring to the Hamachek patent, I will refer to sheet 1 of the drawing and to the conveyor which is located at the lower right-hand corner of that figure and extends upwardly from its inner end, and also to Figs. 8 and 9, 10 and 11, appearing on sheet 4 of the Hamachek patent, and to the specifications, especially at page 3, column 1, starting at line 29, reading as follows: "The inclined chute"—which is the conveyor as pointed out—"86 discharges onto an inclined conveyor belt 91."—

(Testimony of William A. Doble.)

91 is the conveyor belt that I referred to, not 86.

—“which is in the form of an apron of canvas or other suitable material having slats 92 extending across it on its bottom surface to keep it in shape without forming shoulders for engaging and holding the peas, which are discharged thereon by the inclined chute 86. In order that the vines may not slide down the conveyor 91, however, the slats 92 have fingers 93”—In Fig. 1 appearing on sheet 1 and in the Figs. 8, 9, 10 and 11 the fingers are clearly shown and they are indicated by the numeral 93—“projecting upwardly from them”—that is, the fingers project upwardly from the cross-slats—“through the apron and these fingers may be formed integral with metal slats as shown in Figs. 8 and 9, or they may be of sheet metal construction secured to wooden slats as shown in Figs. 10 and 11, or they may be of any other desirable construction.” [220]

Q. In short, they are cross-slots on a separator belt, is that correct?

A. That is correct; have the effect and function of a cross-slat.

Q. Now, before getting to the specific function of the cross-slats, which I notice is set out in the last part of this claim, I would like to go to the next element, which I believe you have already discussed in connection with claim 3: “Said net and the chains supporting the same being disposed on an incline.”

You have already testified, have you not, that there are plenty of machines in the prior art that support a net on an incline?

(Testimony of William A. Doble.)

A. Yes—an incline operating for the same purpose and producing the same results.

Q. And also in connection with the next element: “Means for imparting continuous movement to the belt in a direction causing it to travel up an incline,” that element is also conceded to be old, and you testified that that element is found in prior patents which you have already mentioned in connection with claim 3, is that correct?

A. That is correct. Also its function and its relationship to the other elements of the machine.

Q. And the next element: “Means for maintaining a continuous flow of air through the netting material.” That element has [221] also already been discussed in connection with claim 3 in the prior art patents which you mentioned, is that correct?

A. Yes, that is correct.

Q. And its function of imparting a blast of air through the perforated belt?

A. Which is the same in the art as it is in the patent in suit, contributes nothing new.

Q. As a final element of this claim, before we get to the functional statement, “Means for depositing hops, leaves and stems on the netting material at a point adjacent the upper end,” which you also testified about in connection with claim 3, which is the hopper of Fig. 1 in the Miller patent and also the hopper in the Thys patent—

A. Yes, sir, and the hopper in the Hoffeld patent.

Q. —and also the hopper in the 1,488,249 Horst patent which we just referred to?

(Testimony of William A. Doble.)

A. Yes, sir.

* * * * *

Mr. White: Q. That is Plaintiffs' Exhibit 13, and that [222] is the means for depositing the hops at the upper end of the belt as shown in that Horst patent, is it not? A. That is correct.

Q. Now, Mr. Miller has a functional statement at the end of this claim commencing at line 26 of page 3, the second column: "the mesh in said netting material being slightly smaller than the hops to be separated." Do you find that in the prior art or in prior patents that you have referred to, Mr. Doble?

A. Not as defined in the Miller patent.

Q. What is the distinction, if any, you find?

A. In the Miller patent, as I understand the patent in suit, Mr. Miller wanted to make the opening in his mesh as large as possible so as to rid the material on his separating belt of the small sticks or small branches. By making the openings larger in the belt those small sticks or branches would fall through, and therefore he defined in his specifications that the openings through the mesh in the screen were to be slightly smaller than the average size of the hops to be treated.

Q. Now, you heard Mr. Miller's testimony as to various sizes of hops. I will refresh your recollection. Mr. Miller said that the smaller hops were one-half inch on the small diameter and $1\frac{1}{4}$ inches on the larger diameter; the medium sized or average sized hops were $\frac{3}{4}$ of an inch on the smaller diam-

(Testimony of William A. Doble.)

eter and $1\frac{1}{2}$ inches on the longer diameter, and the large hops [223] were $1\frac{1}{2}$ inches on the small diameter and $1\frac{3}{4}$ inches on the long diameter.

Now, taking the $\frac{3}{4}$ inch by $1\frac{1}{2}$ inch average size of hops, would you say that the Miller patent refers to meshes in that case being $11/16$ ths of an inch on its smaller diameter and $1-7/16$ ths inches on its longer diameter?

A. Yes, that is what I would judge as being slightly smaller, because that would prevent the average size hops from going through, yet it would permit the maximum amount of short stems to go through the openings in that mesh. In that way he might lose some of the smaller hops, but he would increase the premium factor on the hops over all, that is, they would be cleaned to a greater degree, less of the deleterious matter would be left in the material.

Q. But Mr. Miller doesn't state any dimensions for the meshes in this patent, does he?

A. No, he does not.

Q. Would you say if a mesh were made with a smaller diameter, $8/16$ ths of an inch on its narrower portion and $17/16$ ths of an inch on its longer diameter that would be slightly smaller than the average sized hop?

A. No, I would say that would be greatly smaller. Then you are losing the advantage of closing down the opening to get rid of those bothersome little stems that he wishes to get out of his batch of hops

(Testimony of William A. Doble.)

to get the premium for the higher [224] quality of hop separation.

Q. You heard Mr. Miller testify yesterday, did you not? A. Yes, sir.

Q. You heard his testimony to the effect that all the removal and separation that takes place takes place on the upper run of the perforated belt, did you not? A. I heard him so state, yes.

Q. Incidentally, Mr. Doble, have you seen the Oeste separator at the Oeste ranch?

A. Yes, sir.

Q. With reference to Fig. 3 of the Miller patent in suit, did you observe whether or not there were any conveying means underlying the fishnet belt of the Oeste machine?

A. No, sir, there is no conveyor similar to the conveyor 51 of the Miller patent, or no substitute or any means for conveying material which might have dropped through the belt.

Q. Is there any conveyor comparable to the conveyor 50 of the Miller patent, Fig. 3, this takeoff conveyor here (indicating)? You notice the direction of travel of the conveyor 51. Is there any conveyor analogous or comparable to the conveyor 50?

A. If my recollection is correct, he had a means for disposing and conveying away the foreign material which passed over the top of the separating conveyor belt. [225]

* * * * *

Q. Mr. Doble, do you find any teaching the the Miller patent in suit of the means or of a method of

(Testimony of William A. Doble.)

effecting a complete separation between the hop clusters and the foreign material such as stems and leaves solely on the upper run of the perforated belt of his machine?

A. No, sir. To the contrary, as a good portion of Mr. Miller's specifications is a means provided in the drawing to take away the small stems and other small particles which are separated [226] through his separator belt and fall down as—in Fig. 3 they fall down on the conveyor 51 and are conveyed thereby to a disposal conveyor 50.

Q. All right, Mr. Doble. Now, getting to claim 1 of the patent in suit, which commences at the first column of page 3 at line 34. You have read that claim, have you not? A. Yes, sir.

Q. You have already testified in connection with the first, second and third elements, such as the pair of spaced endless sprocket chains, upper and lower pairs of sprocket gears to support the chains, and cross-bars connecting the chains. Your testimony has been, as I understand it, that all of those elements are found in the prior art patents to which you have alluded, is that correct?

A. That is correct.

Q. And that the elements in this assembly of claim 1 perform no different function than the elements perform in the prior art machines, is that correct? A. That is correct.

Q. The fourth element is "a pervious separator belt composed of netting material woven from textile cords supported by the cross-bars."

(Testimony of William A. Doble.)

Now, your testimony has already gone in in connection with that element as far as claims 1, 2 and 3 are concerned, and, as I understand, your testimony is that that element is found [227] in the prior art patents to Thys—which is the last patent of Exhibit 4, your Honor—is that correct?

A. That is correct, and other of the prior art patents.

Q. And that that element performs no different function in the assembly of claim 1 than it does in the prior art patents, is that correct?

A. That is correct.

Q. And with respect to the cross-slats disposed on top of the netting material and securing said material to the cross-bars, you have testified already in connection with claim 2 that that element is found in the prior art, particularly Hamachek patent—

A. Yes, sir.

Q. —Defendant's Exhibit A, and that that element performs no different function in this assembly of the Miller claim 1 than it does in the prior patents? A. That is correct.

Q. Incidentally, a cross-slat is no more nor less than a ledge, is it, Mr. Doble?

A. That is true; it is a ledge placed on a conveyor, which is a very common practice. I have seen it in many canneries and factories where they use extensive conveyors. It is a very common expedient for lodging material on a conveyor belt.

Q. So it hangs up material?

A. That is right.

(Testimony of William A. Doble.)

Q. Material lodges on such a slot? [228]

A. That is correct. A very common expedient.

Q. Now, the next item, line 43 of claim 1, "said netting and the chains being disposed on an incline."

We have already covered that in connection with claim 1, 2 and 3, that that is found in the prior art, particularly the Horst patent 1,488,249 and the Thys patent in suit and other prior art patents, is that correct?

A. That is correct.

Q. Does this element perform any different function than it does in the prior art patents?

A. No, it does not.

Q. With respect to the next item, which is an element relating to imparting continuous movement to the belt, you have already discussed that, have you not, Mr. Doble, means for imparting continuous movement to the belt in a direction to cause it to travel up an incline?

A. Yes.

Q. And that means is found in the prior patents?

A. Yes.

Q. Does that means perform any different function in this assembly than it does in the prior art machines?

A. No, it does not.

Q. And the means for maintaining a continuous flow of air through the netting material, that element has been discussed in connection with claim 3, and that element is found in the [229] prior art patents that you have alluded to?

A. It is in several instances.

Q. And does that perform any different function

(Testimony of William A. Doble.)

in this assembly than it did in the prior art machines?

A. No, they all operate the same way, perform the same function for the same purpose.

Q. And also the last element, "Means of depositing the hops at the top of the inclined belt"—that has been discussed and that is found in the prior art patents? A. That is correct.

Q. And it performs the same function in this assembly as it did in the prior art patents?

A. That is correct.

Q. All right. Now, Mr. Doble, I want to call your attention—Do you have before you particularly the patent to Mackison, No. 525,913? A. Yes, sir.

Q. Do you find in that Mackison patent any of the elements of the assembly of claim 1?

A. Yes, sir.

Q. What, for example?

A. The first element in claim 1 of the Miller patent in suit states, "a pair of spaced endless sprocket chains."

Now, in the Mackison patent the mechanical structure is slightly different. He provides a belt, which in itself [230] performs the work that the chains would perform. It is a complete mechanical equivalent for the chains.

The second element calls for or specifies upper and lower pairs of sprocket gears to support the chains.

Q. And in Mackison you have what?

A. We have the upper and lower rollers 18.

(Testimony of William A. Doble.)

Q. Which are tantamount to pulleys, is that correct? A. That is right.

Q. That is a mechanical equivalent of upper and lower sprocket gears?

A. Yes—perform exactly the same function, same purpose, and same result.

Mr. White: Well, on that testimony, if the Court please, I offer in evidence the Mackison patent to which I have just referred and to which the witness has testified, Mackison patent 525,913, as Defendant's Exhibit B.

(The document referred to was marked Defendant's Exhibit B.)

Mr. White: Q. Now, have you before you, Mr. Doble, prior patent to Randolph No. 555,533?

A. Yes, sir.

Q. Do you find in that prior patent any of the elements of claim 1? A. Yes, sir.

Q. What, for example? [231]

A. I find in the Randolph patent 555,533 numerous examples of separating mechanisms, which include the first element of claim 1, namely, a pair of spaced endless sprocket chains. If one will refer to Fig. 1 of the patent, one of such endless chains, or one group of such endless chains, is shown as the separator D, another as the separator H—or D'—and the third is the separator D-2, and the fourth is the separator F, and the fifth is the separator L.

Q. All right.

Mr. White: If the Court please, I offer in evi-

(Testimony of William A. Doble.)

dence the prior patent to Randolph No. 555,533 as the defendant's exhibit next in order, No. C.

(The document referred to was marked Defendant's Exhibit C.)

Mr. White: Q. Incidentally, Mr. Doble, does the Randolph patent show any means for causing a blast of air to be imparted to the separator belt?

A. Yes, it does.

Q. And where is that shown?

A. Well, there are several of them.

Q. In connection with the various separator belts?

A. Yes. This one at G, one blower at G, then there are two blowers W and W' down in the center of the structure as it appears in Fig. 1.

Q. All right. Now, with reference to the prior patent to [232] Rowland No. 771,273, do you find in that prior patent any of the elements of claims 1 and 2 of the Miller patent in suit?

A. Yes. In Figs—on Fig. 3 and Fig. 4 there is shown the spaced—well, it is a drum, which corresponds to the spaced sprockets around which the separating belt B travels.

Q. Now, with reference to this Rowland patent, will you turn to page 2, lines 72 and 81, and state whether or not there is the disclosure in those lines of means for causing a blast of air against a belt.

A. Yes, sir. Reading from page 2, line 72, of the Rowland patent 771,273, as follows: "The blast from the blower E carries the material not previously

(Testimony of William A. Doble.)

Q. Which are tantamount to pulleys, is that correct? A. That is right.

Q. That is a mechanical equivalent of upper and lower sprocket gears?

A. Yes—perform exactly the same function, same purpose, and same result.

Mr. White: Well, on that testimony, if the Court please, I offer in evidence the Mackison patent to which I have just referred and to which the witness has testified, Mackison patent 525,913, as Defendant's Exhibit B.

(The document referred to was marked Defendant's Exhibit B.)

Mr. White: Q. Now, have you before you, Mr. Doble, prior patent to Randolph No. 555,533?

A. Yes, sir.

Q. Do you find in that prior patent any of the elements of claim 1? A. Yes, sir.

Q. What, for example? [231]

A. I find in the Randolph patent 555,533 numerous examples of separating mechanisms, which include the first element of claim 1, namely, a pair of spaced endless sprocket chains. If one will refer to Fig. 1 of the patent, one of such endless chains, or one group of such endless chains, is shown as the separator D, another as the separator H—or D'—and the third is the separator D-2, and the fourth is the separator F, and the fifth is the separator L.

Q. All right.

Mr. White: If the Court please, I offer in evi-

(Testimony of William A. Doble.)

dence the prior patent to Randolph No. 555,533 as the defendant's exhibit next in order, No. C.

(The document referred to was marked Defendant's Exhibit C.)

Mr. White: Q. Incidentally, Mr. Doble, does the Randolph patent show any means for causing a blast of air to be imparted to the separator belt?

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Q. And where is that shown?

A. Well, there are several of them.

Q. In connection with the various separator belts?

A. Yes. This one at G, one blower at G, then there are two blowers W and W' down in the center of the structure as it appears in Fig. 1.

Q. All right. Now, with reference to the prior patent to [232] Rowland No. 771,273, do you find in that prior patent any of the elements of claims 1 and 2 of the Miller patent in suit?

A. Yes. In Figs—on Fig. 3 and Fig. 4 there is shown the spaced—well, it is a drum, which corresponds to the spaced sprockets around which the separating belt B travels.

Q. Now, with reference to this Rowland patent, will you turn to page 2, lines 72 and 81, and state whether or not there is the disclosure in those lines of means for causing a blast of air against a belt.

A. Yes, sir. Reading from page 2, line 72, of the Rowland patent 771,273, as follows: "The blast from the blower E carries the material not previously

(Testimony of William A. Doble.)

disposed of into the pipe F, causing the lighter parts or parts of the material most easily carried by the air by reason of their shape to pass entirely through said pipe and to be discharged into any suitable room or receptacle.'

Q. Now, do you find any other element of claims 1 and 2 in that Rowland patent?

Mr. White: We will offer this patent in evidence as the defendant's exhibit next in order, the Rowland patent No. 771,273, as defendant's exhibit next in order, Defendant's Exhibit D.

(The document referred to was marked Defendant's Exhibit D.)

Mr. White: Q. Do you have with you, Mr. Doble, the prior [233] Horst patent 1,008,914?

* * * * *

A. Yes, sir.

Q. Do you find in the prior Horst patent to which I have just alluded any of the elements of claims 1 and 2 of the Miller patent in suit?

A. Yes. I find, referring to Fig. 1, a pair of spaced chains—or a pair of spaced endless sprocket chains.

Q. How about with reference to Fig. 8 of the sheet of drawings? Do you find in there pairs of spaced sprocket chains carrying an endless belt?

A. In a sense it is an endless belt, yes, sir. It carries the endless sprocket chains 47 and 48, which in turn carry the stripping means, which are the angular members projecting from those chains.

(Testimony of William A. Doble.)

Q. Those elements are common mechanical elements for imparting motion to endless chains, are they not? A. Yes.

Mr. White: I will offer this as next in order, 1,008,914.

(The document referred to was marked Defendant's Exhibit E.)

Mr. White: Q. Do you have with you the Armstrong patent No. 540,774? A. Yes, sir. [234]

Q. Do you find any elements in that prior patent which are referred to in claims 1 and 2 of the patent in suit? A. Yes, sir.

Q. Are they similar elements or comparable elements?

A. They are comparable elements in that instead of being two sprockets, pulleys with belts passing around the pulleys are provided in the place of chains.

Mr. White: I will offer the Armstrong patent No. 540,774 as the defendant's exhibit next in order, if the Court please.

(The document referred to was marked Defendant's Exhibit F.)

Mr. White: Q. Now, Mr. Doble, in your opinion is there any added function in any one of these claims as a compound whole or aggregation which is new and added over and above the sum of the functions of the individual elements of each of these claims? A. No, sir, I do not.

(Testimony of William A. Doble.)

Q. You do not find any additional—

A. No.

Q. —function whatsoever?

A. They merely add to it. Each one contributes its little portion as it did in the art. In other words, it is merely adding; two and two makes four. There is no surprising result, nothing unexpected. It is merely the summation of the operations—functions of the elements that are old in the art. [235]

Q. Do the sprocket gears and endless chains have any effect or modification upon the separator belt itself?

A. No, it does not. You could use a belt or you could use a rope and a pulley, almost any other means just to carry the belt forward.

Q. It makes no difference whether it is a cable, chain or string?

A. No, it makes no difference.

Q. Does the mounting of the belt on the incline have any effect or modification on the function of the separator belt in and of itself?

A. No, it does not.

Mr. White: If the Court please, I would just like to introduce three more prior art patents which we have cited in the answer.

Q. Mr. Doble, have you before you the Wardell patent No. 1,480,354? A. Yes, sir.

Q. Do you find in the Wardell patent any reference to elements which are included in the combinations of claims 1 and 2 of the patent in suit?

A. Yes, sir, I do. I find a belt which is mounted

(Testimony of William A. Doble.)

for operation in an inclined manner for the purpose of separating material.

Q. Let me invite your attention, Mr. Doble, particularly to [236] page 1, commencing at line 107, of this Wardell patent, carrying over into page 2, line 3.

A. Reading from the Wardell patent from line 107, page 1, as follows: "The belt 10 is preferably surfaced with a layer 31 of material having a pronounced nap, such as carpeting or cocoa matting or a specially constructed fabric of a brush-like character."

Q. Then in the operation of this machine of the Wardell patent the belt 10 functions to collect material on its naplike surface, is that correct?

A. That is correct.

Q. And is there any different function between the fishnet belt of the patent in suit and the function of the belt 10 of the Wardell patent in that respect? A. No.

Q. That is, in collecting material on its naplike surface? A. That is right.

Mr. White: I will offer the Wardell patent in evidence, No. 1,480,354, as the defendant's exhibit next in order.

(The document referred to was marked Defendant's Exhibit G.)

Mr. White: Q. Have you before you, Mr. Doble, the patent to Kier No. 1,026,917? A. Yes, sir.

Q. Do you find in the Kier patent any element

(Testimony of William A. Doble.)

comparable to [237] the elements of claims 1 and 2 of the patent in suit, and I call your attention particularly to page 1, lines 85 to 87?

A. Yes, sir.

Before reading from the place which you have indicated I call your attention to Fig. 1, which shows the series of sprockets with endless chains passing around them, and then quoting from page 1, line 85: "A cover member 15 made of porous cloth or other suitable filtering material is secured upon the bottom plate 13, by fastening means applied along their edges and along parallel lines A which extending longitudinally from one of the ends of the two members terminate along a line spaced from their opposite ends, so as to provide a plurality of pockets 16 which communicate with a space 17 which, in the following description, will be termed the suction chamber of the filtering element."

Q. Now, that cover member made of porous cloth, what is the function of that member in the Kier filtering apparatus?

A. That is to sort and remove certain of the materials which are to be separated.

Mr. White: I will offer the Kier patent in evidence, if the Court please, as the Defendant's Exhibit H. It is No. 1,026,917.

(The document referred to was marked Defendant's Exhibit H.)

Mr. White: I believe that is all for the time being. [238]

(Testimony of William A. Doble.)

Cross Examination

Mr. Hoppe: Q. Mr. Doble, I understand that you have testified in about thirty patent suits, is that right? A. That is correct.

Q. And this is the first time that you have testified for the defendant in a patent case?

A. No, sir.

Q. About how many times have you testified for the defendant in patent cases?

A. I never checked that point. Quite a number of times, though.

Q. Would you tell us what your experiences are in the hop separating field?

A. My experience in the hop separating field is obtained first from study of the patents which have been made exhibits in this case. I have also examined the structure at the Oeste ranch at Elk Grove.

Q. How many hours have you spent in studying this field?

A. I haven't checked on how many hours I have spent.

Q. How long per day? When did you first start your work in learning about the hop separating field? A. Sometime late last year.

Q. That is late in 1951?

A. That is correct.

Q. And how many hours did you spend examining the operation [239] of the Oeste hop separator?

A. I haven't spent any time watching the machine in actual operation. It wasn't the hop separating season when I examined the machine.

(Testimony of William A. Doble.)

Q. Have you ever seen a hop separating machine in operation? A. No, sir, I haven't.

Q. What experience have you had with the problems of separating hops from leaves and stems other than the experience which you obtained by reading the patents and seeing this machine, which wasn't in operation?

A. That is my experience in that particular field.

Q. May I show you the blue book of patents. I turn your attention to Plaintiffs' Exhibit 4 and to the Scott patent, 1,107,207. Would you please state whether that machine as illustrated could be used for separating hops from leaves and vines and stems? A. Yes, I believe it could.

Q. And how would you propose to use it?

A. I would pass the material which results from the stripping operation, that is, the leaves and the stems and the hops, into this rotating cylinder and would strain out the hops through the fishnet as shown in Fig. 5, just in the same way that Scott strains out or separates the peas, beans and cowpeas from the hulls.

Q. And are you familiar with the form of a hop? [240] A. Yes, sir.

Q. And you are familiar with the form of a pea, are you not? A. Yes, sir.

Q. A pea is round and smooth, is it not?

A. Yes, sir.

Q. And a pea would go through the mesh of a net rather readily, would it not?

A. It depends upon the size of the mesh.

(Testimony of William A. Doble.)

Q. If the mesh were of proper size it would go through rather readily?

A. That is correct. So would a hop.

Q. That is, if you followed the Scott teaching?

A. That is correct, and in the same way you would make the openings a little larger to take care of the hop.

Q. And if you were to follow the teaching of the Scott patent in the hop industry, then, you would have the hops pass through the netting, would you not?

A. That is correct. In this case the stems and foreign material would be retained on the screen and the hops would go through.

Q. If you were to follow the Scott teaching, the function and mode of operation of the net as taught in the Scott patent would be to permit the hop bloom to go through the net in the cleaning operation, would it not? A. Yes, it would. [241]

Q. And that is not the way Miss Oeste uses her fishnet, is it? A. No, it is not.

Q. Have you ever seen anyone use a fishnet in a hop separating machine in such a manner?

A. No, I have not.

Q. Now, I call your attention to the next patent you discussed in our Plaintiffs' Exhibit 4, which is the Thompson patent 1,583,201. Have you ever seen that patent,— A. Yes, sir.

Q. —that structure as illustrated used in the hop separating art? A. No, sir.

(Testimony of William A. Doble.)

Q. How would you use that structure as illustrated to separate hops from vines?

A. I would use that structure to separate out the hops at different sizes from the leaves and the vines.

Q. And you would pass the hops through the netting in that case if you were to follow the Thompson teaching and if it were adaptable to the hop separating art, is that correct?

A. That is correct.

Q. That is not the way Miss Oeste uses her fishnet, is it? A. No, it is not.

Q. Would you call that a different function of the separator belt?

A. No. They are both operating to separate material. One [242] retains it on the belt and the other passes it through.

Q. And would you say that they operate in the same way? A. Yes, they do.

Q. In your vocabulary, so we will know what you mean by saying "function," going through a net means the same as staying on top of the net, is that correct?

A. No, that is not correct.

Q. Is that the same way?

A. No. In this case—in the Thompson case you retain certain material on top of the netting. In the earlier patent he passes certain materials through the netting and retains certain materials on the top in the same way that Thompson does.

(Testimony of William A. Doble.)

Q. I am discussing now the material that you want to save. The principal thing you are interested in in a hop separating machine is the hop, is it not?

A. That is correct.

Q. And in this Thompson machine the principal thing you are interested in saving is the potato?

A. That is correct.

Q. And in the Thompson patent when the potatoes go through the netting the dirt that is in the potato will also go through the netting, will it not?

A. Some of it will, some of it may not, depending upon the size of the dirt, the foreign material.

Q. If the dirt is the same size as the potatoes it will go [243] through with the potatoes, will it not?

A. That is right.

Q. And Miss Oeste does not use that structure, does she?

A. No, Miss Oeste doesn't use the Thompson patent.

Q. Now, the next patent that you referred to in Plaintiffs' Exhibit 4 is the Hoffeld patent 2,115,107, and I believe as to that patent you testified that that form of netting would probably work better than fishnet in a separator. Do you recall that?

A. Yes, in certain respects.

Q. Have you seen that work up there?

A. If I remember correctly, this patent belongs to the Food Machinery Company, and when I was in one of their canneries in Hoopeston, Illinois, and another one in Michigan, they had just started using

(Testimony of William A. Doble.)

this particular corn kernel separator and that was operating in the manner shown in this patent.

Q. And have you seen it operate for separating hops? A. No, sir, I have not.

Q. Upon what do you base your opinion that it would work better in separating hops than the fishnet?

A. I didn't say that, Mr. Hoppe. What I said was this: that due to the longer slot there would be a greater tendency for the small twigs to go down through the pervious belt than in the fishnet, which has a relatively short slot.

Q. And have you ever had any experience with metal belts in [244] the hop separating industry?

A. No actual experience. That is, I haven't made or used them myself.

Q. Do you know of any problem which might arise in using a metal belt?

A. No, I don't believe there are any serious problems. They have used metal belts in hop separation. I have seen them, and the patent in suit refers to the use of a metal belt, the Thys patent, which belongs to the plaintiff—

Q. I don't think you got my question.

Would you read my question to the witness, Mr. Reporter.

(Question read.)

A. No, sir, I do not. They are used in the field, extensively used in the field for separating hops, so I see no problem, I see no problem which would be

(Testimony of William A. Doble.)

insurmountable in regard to using the Hoffeld patent in the separation of hops.

Q. And if the thing, as you said, would work better than the fabric belt, one would naturally believe that the art would use it, would you not?

A. I didn't say that, Mr. Hoppe. What I said was this: that due to the longer slots in the perforated separator belt of the Hoffeld patent it would have a greater tendency to permit the twigs and stems to fall through than the relatively shorter diamond shaped opening in the fishnet or in the metal.

Q. Have you any opinion as to how it would perform in the [245] overall operation? Would it work as well or better than or not as well as a fishnet?

A. That depends upon many things. You can explain that in this way: It depends upon the inclination—it depends upon how the hops are fed, it depends upon the spacing, it depends upon the speed of operation, it depends upon the blast of air, how much you blast, how you blast them. So I am afraid your question is just a little too broad to answer yes or no, which I would like to do.

Q. Well, one more question on this patent: Does Miss Oeste use the belt illustrated in the Hoffeld patent?

A. She uses a metallic belt on her finishing separators, but uses a fishnet belt on her primary separator.

Q. Does she use a belt structure of this type with

(Testimony of William A. Doble.)

separator pins going through as illustrated in Fig. 3 and Fig. 4?

A. She uses a belt which has rods going through, spreader members that I think you are referring to, are you not?—members 24. In the metal separator belt used by Miss Oeste there are metal spacing rods that go through the metal mesh of the separator belt.

Q. And I take it she uses the members 23 which extend longitudinally in Fig. 3?

A. She does use them, but not exactly in that shape. In other words, the strands of wire are formed into a mesh and in that way you obtain the separating surface which the rods 23 provide. [246]

Q. And that separating member does not look like Figs. 3 and 4? A. Yes, it does.

Q. Just exactly like Figs. 3 and 4?

A. Oh, no, not exactly.

Q. I am talking about in the identity we have in the patent.

A. I am sorry, Mr. Hoppe. Its shape is a little bit different. It is a metal screen, where this screen is made up of bars.

Q. Now, what is the closest patent, in your opinion, of all of this art to the disclosure of the Miller patent?

A. I had picked out the Thys patent and the Hoffeld patent as the two closest representations.

* * * * *

Q. And where would the Scott patent fit in your order? Would that be high up or down below?

(Testimony of William A. Doble.)

A. No, that is just one of the prior art patents which shows certain features.

Q. Now, the Thys and the Hoffeld patents were both cited by the Examiner in the prosecution of this case, is that correct? A. That is correct.

Q. And so was the Scott patent?

A. Yes, sir.

Q. And so was the Thompson patent? [247]

A. Yes, sir.

Q. I am going to ask you a hypothetical question: Assume that the words "coarse fabric" in the Thys patent, with that assumption, assuming that that means burlap, then which would be the closest prior art patent to the Miller patent?

A. I don't believe I can agree to that hypothesis.

Q. I am asking you to assume that as a hypothetical question.

A. I think it is too indefinite, Mr. Hoppe. There are all kinds of burlap. There is the burlap with very wide spacing and there is the burlap of less wide spacing. You would have to have the burlap here so I could look at it.

Q. Well, let's take a burlap like the ordinary burlap. Ordinary burlap is meshed, is it not, like window screening, is it not?

A. It is interwoven like the mesh shown in Fig. 2 of the Thys patent.

Q. Now assuming—assuming that that means burlap and it does not mean fishnet—just make that assumption——

* * * * *

(Testimony of William A. Doble.)

Mr. Hoppe: Q. I say, assuming that the words "coarse fabric" do not mean fishnet, and assume that they mean ordinary, everyday, common garden variety of burlap such as that used in a burlap bag, assume that; then which is the closest [248] patent to the Miller disclosure?

Mr. White: If the Court please, I object to the question as outside the evidence. In order to ask a hypothetical question of this character it must be based upon evidence. There is nothing in the Thys patent which says that the coarse fabric is common, ordinary, garden variety of burlap or anything of that nature. A hypothetical question must be based upon the evidence. He is referring to the Thys patent, and there is nothing in the Thys patent about burlap.

The Court: Overruled. You may answer.

A. I will answer your question in this way: I don't know just what the common variety of burlap is.

The Court: Take a barley sack.

The Witness: A barley sack?

The Court: Yes, a barley sack.

The Witness: Well, taking a barley sack as the degree of measurement—but I don't want to be limited that that is the only size of burlap. Meshes are larger—some of the potato sacks have very large meshes, and I believe that is burlap. But just taking a barley sack, for example, I believe the same two patents would still be the closest representation to the patent in suit.

(Testimony of William A. Doble.)

Mr. Hoppe: Q. Now I want to direct your attention to the Thys patent No. 2,138,529, and you said that in that patent you found cross-rods and cross-slats which secured the netting to [249] the chains. Would you please point out what figure you see those in and what the numbers are.

A. They are not shown specifically——

Q. Would you please circle them with a pencil in the drawings.

A. I can't do that, because the separating belt F is not shown in detail; it is merely shown indicative of a belt.

Q. And where do you see the indication of the cross-slat?

A. There is no indication of the cross-slat. As I say, the separator belt is merely shown diagrammatically in Fig. 1 of the patent.

Q. Now, you testified, as I understand it, in speaking of the Scott patent that he could either knot or staple his cross-strands together?

A. That is correct.

Q. What is a knot and what is a staple?

A. A knot is a piece of string or a piece of any relatively flexible material which is wound around and twisted in such fashion that it will stay in a fixed position. A staple is usually a metal member which is bent into a particular form, usually a U-shape, and then it is clinched to hold one or more parts together.

Q. Now, you stated in the Thys patent you found knots.

A. The Thys patent, yes.

(Testimony of William A. Doble.)

Q. The Thys patent 2,138,529. By the word "knot" did you mean those staples that appear in Fig. 2? [250]

A. I am not certain whether they are staples or knots. They are not very clearly shown. They look like loops and they could be knots or they could be staples.

Q. Aren't they definitely illustrated as being knots?

A. I couldn't say whether they are or not. The drawings are very sketchy. They are not as complete and not as full detail as some patent drawings are made.

Q. Now, you went over these various elements element by element with Mr. White and you found some or more of them in some or more of the prior art patents. Now, it is a fact, is it not, that sprocket chains are infinitely old? A. Yes, sir.

Q. And that sprocket gears are infinitely old?

A. Yes, sir.

Q. And cross-bars of various kinds are infinitely old? A. Yes, sir.

Q. And fishnet is infinitely old, is it not?

A. Yes, sir.

Q. With knots on it? A. Yes, sir.

Q. It was used in Biblical times, wasn't it?

A. I don't know. I wasn't here.

Q. We read of the fishnet in the Bible, do we not?

A. But I don't know how that fishnet was made.

Q. But you do know that it is old? [251]

(Testimony of William A. Doble.)

A. Oh, very old.

Q. You do know that various means for depositing materials on belts are infinitely old, are they not?

A. Certainly.

Q. And blowers are infinitely old?

A. Yes, sir.

Q. And means for maintaining flows of air by means of blowers are infinitely old, are they not?

A. Yes, sir.

Q. And I believe that you testified that in this particular patent these various items perform no function that they had not performed before?

A. What do you mean by "this patent?"

Q. In the Miller patent.

A. Oh, in the Miller patent? That is correct.

Q. And, as I understand your testimony, you say that there is no new function?

A. There is no new or startling function. It is merely the added function of each of the elements. There is nothing, you might say, spontaneous or creating something new. It is merely the addition of two and two equal four. Each of the elements contributes only just what it had done in the prior art, and the total result is a summation of each one of those individual elements and not something beyond that.

Q. Now, in making that answer that you just made, did you take [252] into consideration Mr. Wissemann's testimony in which he testified that by making only one change in his machine, which was taking out the slat type separator and putting

(Testimony of William A. Doble.)

in the fishnet type separator, that he reduced his content of waste—the foreign material—from about 6 per cent down to about 1 or 2 per cent? Did you take that testimony into consideration in making your answer?

* * * * *

The Court: Overruled.

A. I certainly took that into consideration. There are so many factors that I don't think that Mr. Wissemann's testimony has material value. The amount of air that he was putting through his new machine was not defined as the same as he used in the other machine, or if he used any separating air at all in the previous machine. There were so many variables that I don't think his testimony really amounted to very much. And he added more separators. He didn't rely on just the one. He had five stages instead of three. So I couldn't see very much value to his testimony, between you and me.

Mr. Hoppe: Q. And if his testimony had value and if his testimony were believed, would your answer still be the same?

A. I don't see how I can answer that. That is too problematical. There are so many things that are away out of control there. [253] You haven't brought it down to a basis that I can talk about.

Q. Then your answer is you don't know?

A. I wouldn't know. I am sorry. I would like to answer that. As I understand it, the separation of the hops depends upon the quantity you are running through. Maybe one year you have more and

(Testimony of William A. Doble.)

you crowd the machine and you don't get as good a separation.

Q. Then you don't know, is that it?

A. The plain truth is I don't know. It is too indefinite.

Q. Now, assuming for the moment that the Thys patent does not disclose fishnet, with that assumption, what is the first fishnet hop separator shown in this art that you have testified about?

A. Fishnet—you mean by that of a fabric material?

Q. With knots in it of the kind that Miss Oeste uses.

A. Well, I don't find any, but I want to qualify that answer. I can't agree with your assumption. My reading and understanding of this patent is that it does disclose a fishnet, that it does disclose either knots or staples which provide the same little interference that the knots provide, and that it does perform in the same way, produces the same result as the Miller patent here in suit.

Q. But your answer is that if you could accept the assumption, there is no other prior art that discloses that arrangement?

A. I cannot accept that assumption because it is contrary to [254] fact.

Q. Well, then, may I ask you if you ignore the Thys patent from your consideration, just ignore it, is there any other patent other than the Thys patent which discloses the type of separator which Miss Oeste uses?

(Testimony of William A. Doble.)

A. I will answer that no, but I will say this: that there is other art that discloses the machine as disclosed in the Miller patent.

Mr. Hoppe: No further examination.

Redirect Examination

Mr. White: Q. On that last point, Mr. Doble, to refresh your recollection, you read the file wrapper of the Miller patent in suit, did you not?

A. Yes, sir.

Q. And the Patent Office invited the attention of the patentee Miller to the Scott and Thompson patents, did it not? A. Yes, sir.

Q. In fact, rejected the claims to the fishnet on the Scott and Thompson patents, did it not?

A. Yes, sir.

The Court: You have gone into that before.

Mr. White: Q. So there was in the prior art, even ignoring Thys, the type of separator belt which was used by the defendant, isn't that correct?

A. That is correct. [255]

Q. And that is shown in the Scott patent?

A. Yes, sir, one example in the Scott patent.

Q. Now, with reference to the Hoffeld patent, which Mr. Hoppe questioned you about, particularly Fig. 3, that is, patent No. 2,115,107, and the cross-bars 23, 25 and 24, and your answer, as I recall, was that the recleaner machine used at the Oeste ranch, which is the closely woven wire mesh, was not—that the Hoffeld patent was not like that, be-

(Testimony of William A. Doble.)

cause the Hoffeld patent didn't have the mesh; is that your testimony?

A. No—well, it is a different construction of mesh. Let me put it this way: One mesh is made up of bars and slats and the other is made up of bars and wire woven to make a flexible belt.

Q. And is it your testimony, then, that the disclosure of the Hoffeld patent is the mechanical equivalent of the showing of the Oeste machine in so far as separation is concerned?

A. It certainly is.

Q. As to all the elements * * * of the prior art patents and which you find in the Miller patent and which you find in the accused machine, would you say that the elements of the accused machine are the mechanical equivalents of those comparable elements shown in the prior art? [256]

A. Yes, sir, they certainly are.

Q. All mechanical equivalents or the same thing?

A. Or the same thing, that is correct, without any new or unexpected result or mode of operation.

Q. That is, the joint actions of the assemblies of the claims 1, 2 and 3 do not perform any new function other than the sum of the individual elements of those claims, is that correct?

A. That is correct.

Mr. White: That is all.

Mr. Hoppe: No further examination.

(Recess.)

Mr. White: The defendant rests, if your Honor please.

The Court: Any rebuttal?

Mr. Hoppe: No rebuttal, your Honor. [257]

* * * * *

[Endorsed]: Filed August 28, 1952.

[Endorsed]: No. 13,885. United States Court of Appeals for the Ninth Circuit. Thys Company, and E. Clemens Horst Company, Appellants, vs. Sophie Oeste, an individual, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: June 23, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13885

THYS COMPANY, a corporation, and E.
CLEMENS HORST COMPANY, a corpora-
tion, Plaintiffs-Appellants,

vs.

SOPHIE OESTE, an individual,
Defendant-Appellee.

APPELLANTS' STATEMENT OF POINTS
ON APPEAL

Plaintiffs-appellants file this statement of the points on which they intend to rely in accordance with Rule 19(6) of the Rules of this Court:

1. The Trial Court erred in making its Findings of Fact 5, 6, (excepting 6c), 8, 9 and 10, and in concluding Conclusions of Law 2, 3, 4 and 5.

2. The Trial Court, in its judgment entered March 18, 1953, erred in concluding that the defendant is entitled to judgment, and in ordering, adjudging and decreeing that United States Letters Patent No. 2,226,009, issued to E. Clemens Horst Company, a corporation, as assignee, is invalid; in dismissing the complaint herein with prejudice; and in awarding costs to defendant.

3. The Trial Court erred in failing to grant a final injunction against further infringement by

defendant and those controlled by defendant; in failing to order an accounting for damages; in failing to enter judgment for a sum equal to three times the amount of actual damages sustained by plaintiffs; in failing to assess costs against defendant; and in failing to award reasonable attorney's fees to plaintiffs as prayed in the complaint on file herein.

4. In testing for the validity of the claims of the patent in suit, the Trial Court erred in failing to apply the principles appearing in Public Law 593, 82nd Congress, Chapter 950, 2nd Session, H. R. 7794, 66 Stats. 792, which revises, codifies and enacts into law Title 35 of the United States Code, entitled "Patents".

/s/ STEPHEN S. TOWNSEND,

/s/ CHARLES E. TOWNSEND, JR.,

/s/ CARL HOPPE,

Attorneys for Plaintiffs-Appellants

Acknowledgment of Service attached.

[Endorsed]: Filed July 3, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION

The parties, by their attorneys, stipulate as follows:

1. The appellant need print only 11 books of exhibits incorporating plaintiffs' exhibits 1 to 18, both inclusive, and defendant's exhibits A to H, both inclusive, except as otherwise noted herein.

2. Letters Patent No. 2,226,009 may be omitted in reproducing plaintiffs' exhibit 2 since such Letters Patent will be a part of the exhibit book as plaintiffs' exhibit 1.

3. The Clerk is authorized to retain seven copies of the book of exhibits, to send two copies to appellants' counsel, and to send two copies to appellee's counsel.

/s/ MARGARET E. WHITE,
for White & White, one of the attorneys for Appellants

/s/ CARL HOPPE,
One of the attorneys for Appellant

[Endorsed]: Filed July 3, 1953. Paul P. O'Brien,
Clerk.



No. 13889.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLANTS.

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FILED
DEC 31 1953



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No. 13889.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

Jurisdiction.

(a) *Of the District Court.* This action was filed in the District Court by appellants against appellee, United States of America, under the Federal Tort Claims Act. Under section 1346 of the Act (Title 28, U. S. C. A.), exclusive jurisdiction of such actions is vested in the District Courts.

The District Court entered a final judgment dismissing the action [Tr. 38] on the ground that the claims sued upon were not cognizable under the Act [Tr. 22-37].

(b) *Of the Court of Appeals.* Appellants have taken this appeal from the said judgment of dismissal. Juris-

diction of the appeal is vested in this Court pursuant to Title 28, U. S. C. A., Section 1291.

The Government heretofore moved to dismiss the instant appeal on the ground that it was not taken from a final judgment, and on August 31, 1953, this Court entered its order denying said motion to dismiss.

Statement of the Case.

(a) The Complaint [Tr. 3-9].

The essential allegations of the complaint are as follows: On August 5, 1950, some 17 house trailers belonging to 17 different individuals were located at Fairfield-Suisun Air Force Base (pars. V, XI¹); on August 5, 1950, employees of defendant United States acting in the course and scope of their said employment so negligently maintained and operated a certain B-29 aircraft belonging to defendant that it crashed in the vicinity of said house trailers and the plane and its contents thereupon exploded; as a proximate result thereof, said trailers were damaged (pars. IV, VI, VII); plaintiffs were insurance companies and insured said trailers against explosion damage (pars. VIII, XI); plaintiffs paid to the respective owners of said trailers, the full amount of loss thereto, the total loss payments being in the sum of \$49,661.00 (pars. IX, XI); by virtue of said payments, plaintiffs became subrogated to the rights of their respective insureds against defendant for recovery of said damage (par. X).

¹The paragraph number (XI) is inadvertently omitted from the Transcript of Record. Paragraph XI will be found at page 7 of the Transcript.

(b) **The Motion to Dismiss [Tr. 10-11].**

Defendant moved to dismiss the complaint on the ground that there was no jurisdiction of the subject matter because the trailers belonged to Air Force personnel on active duty, and claims for their negligent destruction were not cognizable under the Tort Claims Act.

(c) **The Stipulation of Facts [Tr. 13-17].**

For the purpose of the motion, plaintiffs and defendant entered into a stipulation of facts,² of which the following are the material portions:

(1) The owners of the trailers were enlisted men and officers of the United States Air Force assigned to Fairfield-Suisun Air Force Base, and they lived in the trailers with their families [Tr. 15-16].

(2) Each of the trailers was the private property³ of the soldier concerned, and the Government had no interest therein [Tr. 16].

(3) The personnel were entirely free to live off the Base [Tr. 15].

(4) There were not sufficient public quarters on the Base to house the personnel assigned to the Base, and the surrounding area was a critical housing area [Tr. 15].

(5) For the convenience and accommodation of the personnel and their families, the Government established a Trailer Park on the Base [Tr. 13-16].

²The same stipulation was also signed by counsel for the plaintiffs in seven other cases which cases were also decided by the same opinion of the District Judge as decided the instant case. We are advised that the plaintiffs in those cases have also appealed to this Court from the ruling of the District Judge.

³All of the personnel were married and the trailers were actually the community property of the soldier and his wife [Tr. 16].

(6) The use and occupation of the Trailer Park was not required in the operation of the Base [Tr. 16].

(7) No one was required to use the Trailer Park, and personnel who desired to do so made voluntary application at their sole discretion for permission to park their trailers therein [Tr. 16].

(8) The personnel who used the park were required to pay rental to the Government for the space assigned and also to pay for the utilities furnished [Tr. 14-16].

(9) Personnel occupying the park were entitled to and drew the regular quarters allowance allowed to personnel not furnished government quarters and who lived off the Base [Tr. 15].

(10) Personnel occupying the park were free to leave the Base on the same basis as all other personnel [Tr. 14].

(11) The house trailers involved in the suit were located in the Trailer Park at the time of the plane crash [Tr. 13].

(12) The plane that crashed had taken off from the Base a short time before it crashed [Tr. 17].

(13) The owners of the trailers had no duties whatsoever with respect to the maintenance, servicing, loading, operation, dispatch or control of said plane [Tr. 16].

(14) At the time of the crash, the owners of the trailers were off duty in neighboring communities [Tr. 16].⁴

⁴The stipulation states that the personnel were on and off duty on and off the Base, some of them even being located overseas. Since the District Court disposed of the case on a motion to dismiss on a basis of lack of jurisdiction, appellants believe they are entitled to take the statement of facts in the light most favorable to them, where different fact situations are provided for in the stipulation, as here.

(15) The trailers were fully insured, and the insureds had no uninsured losses with respect thereto [Tr. 7]; however, the insureds and their families sustained other uninsured personal property losses as a result of the crash; as to these latter articles, they submitted claims to the Government under the Military Personnel Claims Act of 1945,⁵ which were paid in part⁶ [Tr. 15, 18-20].

(16) The claim forms filed by the soldiers with the Government set forth that the house trailers were fully insured (by a named insurer), and that the insurer had paid the full loss thereon to the soldier; and no claim was made therefor by the soldier and nothing paid with respect thereto by the Government [Tr. 15-18].

(d) The Opinion of the District Judge [Tr. 22-37].

The District Judge concluded that the claims for loss to these trailers were not cognizable under the Tort Claims Act for the following reasons:

(1) In *Feres v. United States*, 340 U. S. 135, 71 S. Ct. 153, 95 L. Ed. 152, the Supreme Court held that "suits by servicemen for (personal) injuries which 'arise out of or are in the course of activity incident

⁵59 Stat. 225, 31 U. S. C. A. 222(c).

⁶As will be noted in more detail hereinafter, said Act "authorizes" (but does not require) the Secretary of Defense to pay military and civilian personnel of the Defense Department for such personal property losses incident to their service as he "may by regulation prescribe," where the property is "determined to be reasonable, useful, necessary or proper under the attendant circumstances." The Act and the Regulations adopted pursuant thereto contain numerous exclusions and restrictions with respect to the type and amount of loss for which the Government will pay, even though the loss is "incident to service." This no doubt explains why the sample claim in the record [Tr. 18-20] was only allowed for 50% of the uninsured claim, and the insured portion entirely disallowed.

to service' are not maintainable under the Federal Tort Claims Act"⁷ [Tr. 23].

(2) The rule of the *Feres* case as to service connected personal injury claims "should apply to suits by servicemen for property losses"⁸ [Tr. 24].

⁷In *Brooks v. United States*, 337 U. S. 49, 69 S. Ct. 918, 93 L. Ed. 1200, where a soldier, while on furlough, was injured by a negligently driven Army truck, the Supreme Court upheld his right to sue the Government for damages under the Tort Claims Act. This decision was approved in the *Feres* case on the ground that the injury to Brooks "did not arise out of or in the course of military duty" and because "Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders."

⁸In making this statement, the District Judge noted [Tr. 24] that "all the parties agree, and so does the court," that the personal injury rule of the *Feres* case should apply to service connected property losses. Appellants do not agree, in fact emphatically disagree for reasons which will be hereinafter pointed out in detail, that the rule of the *Feres* case is applicable to service connected property losses. It will be shown that for the past 40 years, both Congress and the Executive Department have provided and recognized that service connected property losses of military personnel were cognizable and payable under all claims statutes, including the Tort Claims Act, the same as property losses of civilians, and were not restricted to the Military Personnel Claims Act of 1945 and its predecessors.

In Memo of points and authorities in the District Court (p. 3), appellants at one point conceded (for the purpose of argument only), that the rule of the *Feres* case might be applied to service connected property losses, and then argued that these losses were not service connected; but on pages 8 and 9 of this same Memo, appellants argued that the fact that the Military Personnel Claims Act may have also covered these claims, "does not preclude coverage of the same claim by the Tort Claims Act" and that the Military Personnel Claims Act "cannot operate to bar the claims here in suit."

The District Judge reached his decision in this case as a result of his own reasoning and research, and not because of reliance upon any statement in appellants' Memo. There was no stipulation in the District Court with respect to the matter in question. The Government moved to dismiss the complaint because of an alleged lack of jurisdiction. The District Judge decided the question purely as a question of law. If the decision was incorrect as to this issue, appellants are entitled to urge such error on this appeal.

(3) The Military Personnel Claims Act of 1945 was intended as and is the sole and exclusive remedy of service personnel for property damage losses incident to their service. Said the District Judge:

“The Military Personnel Claims Act of 1945 (cit.) was passed for the expressed purpose of providing a ‘single’ statute for the settlement of *claims of military personnel* for the loss of their personal property incurred while in the service.” [Tr. 26.]

“It was manifestly the intent of the Congress that the Military Personnel Claims Act should remain as the *single* comprehensive remedy for property losses of *military personnel* incident to their service.

“Since property losses of *military personnel* incident to their service are *compensable exclusively* under the Military Personnel Claims Act * * *⁹ [Tr. 29].

(4) The sole test in determining whether property damage losses are service connected within the rule of the *Feres* case and so excluded from coverage under the Tort Claims Act is whether they are “incident to service” under the Military Personnel Claims Act.

“Since property losses of military personnel incident to their service are compensable exclusively

⁹In spite of the broad language of the District Judge that said Act was the “*single remedy*” of *service personnel for property damage claims incident to service*, and without noting any apparent inconsistency therewith, the District Judge found it unnecessary “to determine whether military personnel may sue under the Tort Claims Act for property losses (incident to their service), which, by regulation, are not reimbursable under the Military Personnel Claims Act” [Tr. 36], or “to determine whether suits may now be brought under the Tort Claims Act upon claims exceeding the \$2500 maximum prescribed for compensable claims by the 1952 amendment” to said Act [Tr. 29].

under the Military Personnel Claims Act, that Act must be the guide in determining what losses are 'incident to service' " [Tr. 29].

(5) The term "incident to service" as used in the Military Personnel Claims Act

"was not employed * * * in any restricted sense to require that a compensable loss occur during the performance of military duties or on a military base. The term was used in a general sense merely to indicate that the loss must bear some substantial relation to the claimant's military service" [Tr. 34].

(6) The losses to the trailers were incident to the service of the owners under the Military Personnel Claims Act [Tr. 34].

(7) The losses were not within the exclusion in said Act of losses occurring "at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government" (31 U. S. C. A., Sec. 222(c)) [Tr. 35-36], because *the piece of ground* upon which the soldier parked his trailer and for which he paid a rental, constituted "*assigned quarters*" and the occupancy by him of government "*quarters*" [Tr. 35-36].

(8) These claims were not cognizable under the Military Personnel Claims Act since the Regulations thereunder exclude claims which are "recoverable from an insurer" [Tr. 37] (and see 32 C. F. R. 836.93(j)).

(9) Nor are these claims cognizable under the Tort Claims Act, *since if they had been uninsured*, they would have been compensable under the Military Personnel Claims Act¹⁰ [Tr. 36], which is *the single, exclusive remedy of personnel* for property losses incident to service [Tr. 26-29].

(10) This leaves appellants without any court or administrative remedy.

“If plaintiffs feel themselves aggrieved, * * * their recourse must be to the Congress. Suits against the Government by insurers¹¹ to recover for the service-connected property losses of military personnel, are not authorized * * *” [Tr. 37].

¹⁰Actually there is no way of telling if the losses to the trailers, if uninsured, would have been recoverable under the Military Personnel Claims Act, and if so, to what extent; 32 C. F. R. 836.93(g) excludes claims for damage to motor vehicles, except in the case of public disasters (such as was the case here), in which event the “claim may be recommended to the approving authority *for consideration.*” Bearing this in mind, and the further discretion contained in 32 C. F. R. 836.94 as to the amount to be allowed as to any claim, depending on “the circumstances,” and the variation in value of these trailers from a low of \$1,600 to a high of \$4,500, it is clear that no one can state what disposition would have been made of these trailer claims, if they were uninsured.

¹¹While the District Judge attempted to restrict the scope of his decision to the insurance exclusion contained in the Regulations, he failed to point out why the decision is not equally applicable to the many other claims excluded or restricted under the Regulations. As heretofore noted (footnote 9, *supra*), the District Judge found it “unnecessary” to determine this latter question. As will be pointed out hereinafter, if the decision is correct, it will also apply to all such excluded and restricted claims, and hence the ruling is of importance not only to insurers but to the millions of military and civilian personnel of the Defense Department.

Specification of Errors and Questions Involved.

The District Court erred in the following respects:

(1) In holding: that the Military Personnel Claims Act is the sole remedy of military personnel for service connected property damage losses; that the service connected personal injury rule of the *Feres* case is applicable to service connected property damage losses; that such property damage losses are not cognizable under the Tort Claims Act.

(2) In holding: that property damage claims incident to service that are excluded from coverage under the Military Personnel Claims Act are nevertheless not cognizable under the Tort Claims Act, thus leaving the claimant without any remedy; that these claims were not within the "quarters" exclusion of the Military Personnel Claims Act.

(3) In holding that these losses were service connected within the rule of the *Feres* case.

ARGUMENT.

I.

The Legislative and Administrative History of the Military Personnel Claims Act and the Tort Claims Act Compels the Conclusion That Negligently Caused Service Connected Property Damage Claims Are Cognizable Under the Tort Claims Act.

(a) **The District Judge's Analysis of the Military Personnel Claims Act Was Erroneous.**

The District Judge noted that the Military Personnel Claims Act of 1945 was one part of a tripartite congressional plan to consolidate into three statutes, all claims incident to activities of the War Department. The first part was the Foreign Claims Act of 1943 (57 Stat. 66, 31 U. S. C. A., sec. 224(d)), which covered claims of inhabitants of foreign countries damaged by activities of the Army in such countries. The second was the Military Claims Act of 1943 (57 Stat. 372), which (when enacted) covered claims incident to noncombat activities of the Army, *but excluded personal injury and property damage claims of military personnel incident to service.* The third was the Military Personnel Claims Act of 1945 passed by the 79th Congress, and which covered property damage claims of military personnel incident to service. In 1946, this same Congress passed the Tort Claims Act, which specifically repealed *pro tanto* so much of the Military Claims Act of 1943 (and various other claim statutes) as covered negligence claims and put *all of such negligence claims* under the Tort Claims

Act. The District Judge concluded from this, and from the mention of the 1943 Military Claims Act and the failure to mention the 1945 Military Personnel Claims Act in the Tort Claims Act, that:

“it was manifestly the intent of the Congress that the Military Personnel Claims Act should remain as the single comprehensive remedy for property losses of military personnel incident to their service.” [Tr. 26-29].

It is respectfully submitted that in so analyzing these statutes and in reaching the above conclusion, the learned District Judge fell into an error that completely destroyed the premise upon which the above conclusion is based. *When enacted in 1943, the Military Claims Act did exclude personal injury and property damage claims of military personnel incident to service. But by section 4 (hereinafter referred to in detail) of the Military Personnel Claims Act of 1945, the 79th Congress specifically repealed so much of the Military Claims Act of 1943 as excluded property damage claims of military personnel as were incident to service, and thereafter such claims were included under the Military Claims Act as well as under the Military Personnel Claims Act. And when the Tort Claims Act was enacted by the same 79th Congress, and it transferred to the Tort Claims Act all negligence claims then cognizable under the Military Claims Act (and other claim statutes), it thereby included therein negligently caused property damage claims of military personnel incident to their service. That it was the deliberate and carefully considered intention of Congress and the Defense Department that property damage claims of service personnel incident to their service were to be cognizable under all applicable claims*

statutes including the Tort Claims Act, and were not to be restricted to the Military Personnel Claims Act appears beyond any question upon a consideration of the legislative and administrative history and construction of the various claims statutes, starting with the Military Personnel Claims Act of 1885 up to and including the Tort Claims Act of 1946. We set forth such a history herewith.

(b) The Various Claim Statutes; Their Scope and Construction.

(1) THE MILITARY PERSONNEL CLAIMS ACT OF MARCH 3, 1885 (23 Stat. 350).

This was the first military personnel claims act and was quite restricted in scope. It provided for the Treasury Department to determine the value of private property of military personnel "lost or destroyed in the military service" under certain restricted circumstances. It further provided that liability under the Act

"shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

**(2) THE "GUNFIRE ACT" OF AUGUST 24, 1912
(37 Stat. 586).**

This was the first general claims act covering property damage claims incident to noncombat activities of the army. It provided as follows:

"*Provided*, that hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on *all claims* for damages

to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to * * * private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor."

It will be noted that the Act covered "*all claims* for damages to and loss of private property," but did not specifically mention property damage claims of military personnel incident to service. In *Digest of Opinions, Judge Advocate General of the Army, 1912-1940*, Sec. 709, page 449 (Opinion No. 18-463, 8/31/14), it appeared that an army officer occupied government quarters at West Point, and that heavy artillery practice caused a china closet in his quarters to fall, thus breaking his china and glassware valued at \$620. The loss was held to be "in the service" under the 1885 Act, but within one of the exclusions thereof, since the articles were of an expensive nature. The Judge Advocate General ruled that the claim was, however, covered under the Gunfire Act of 1912, *supra*:

"*Held*, That from the unusually expensive character of the articles destroyed, they could not be considered such as the Secretary of War should determine to be reasonable, useful, and necessary for the officer in service while in quarters, within the meaning of the act of March 3, 1885 (23 Stat. 350) but that the claim might be adjusted and re-

ported to Congress for appropriation¹² under the provisions of the act of August 24, 1912 (37 Stat. 586), as a loss of private property not exceeding \$1,000 in value occasioned by heavy gunfire and target practice of troops, *the act applying to losses of private property of officers residing upon military reservations as well as to losses of the property of civilians.*”

(3) THE MILITARY PERSONNEL CLAIMS ACT OF JULY 9, 1918 (40 Stat. 880).

This Act amended and somewhat broadened the 1885 Act, but the specific amendments are not pertinent to the issues here.

(4) THE MILITARY PERSONNEL CLAIMS ACT OF MARCH 4, 1921 (41 Stat. 1436).

This Act further amended and broadened the 1885 and 1918 Acts. As did its predecessors, it contained many exclusions and restrictions, and the allowance and amount of allowance of any particular claim was within the discretion of the Secretary of War.

(5) THE SMALL TORT CLAIMS ACT OF DECEMBER 28, 1922 (42 Stat. 1066).

This was the first general negligence (tort) claims act passed by Congress. It covered “any claim” for negligent damage to “privately owned property” up to

¹²Since the opinion was written in 1914 and the Digest was not published until 1940, it may be assumed that over the years Congress appropriated the money for payment of this and similar claims.

\$1000.¹³ Claims allowed by the department head were certified to Congress for payment. Again, it made no specific mention of claims of military personnel. The pertinent portions of this Act were as follows:

“Sec. 2. That authority is hereby conferred upon the head of each department * * * of the United States to consider, ascertain, adjust, and determine *any claim* * * * on account of damages to or loss of privately owned property where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. Such amount as may be found to be due to any claimant shall be certified to Congress as a legal claim for payment out of appropriations that may be made by Congress therefor * * *.”

The Judge Advocate General of the Army construed this Act as including negligently caused property damage losses of military personnel incident to their service. And since Congress had to appropriate the funds to pay claims under this Act, it is apparent that Congress concurred in such construction. For example, see the following Judge Advocate General's opinions:

“Property of Army personnel.—If the loss of private property of an officer while in storage is due to the negligence of any officer or enlisted man, though not payable under the act of March 4, 1921 (41 Stat. 1436), under the Comptroller's rulings, the amount may be certified to Congress under the act of December 28, 1922 (42 Stat. 1066).” 332.32, May 21, 1926, *Dig. of Ops. JAG Army*, 1912-40, p. 456, Sec. 713.

¹³Claims over \$1,000 could only be allowed by obtaining passage of a special bill by Congress.

“Claim for loss of baggage. Claimant, an Army officer, was ordered from a station in the continental United States to one in the Canal Zone. After the effective date of his orders and after his compliance with them the baggage in question was purchased by third parties as a wedding present for claimant and shipped to him by Army transport. It was lost in transit. Claim disallowed. Held: Baggage purchased after the effective date of change of station orders may not be included in the authorized change of station allowance of baggage and its loss in transit is not reimbursable under the act of Mar. 4, 1921, as implemented by AR 35-7100. However, if such a loss is due to the negligence of Government employees, relief may be had under the act of Dec. 28, 1922, as implemented by AR 35-7070.” SPJGD, 1942/5773, Nov. 25, 1942, 1 *Bull. JAG Army*¹⁴ 331.

That these claims were incident to service within the meaning of the Military Personnel Claims Act but were not payable thereunder only because of exclusions or restrictions in that Act is implicit in the above opinions, and from Footnote 6 of the opinion of the District Judge herein [Tr. 33].

(6) THE MILITARY CLAIMS ACT OF JULY 3, 1943
(57 Stat. 372).

This Act was intended to include claims for personal injury or property damage (negligent or non-negligent) arising out of noncombat activities of the War Department, not exceeding \$500.00 in amount. The Act pro-

¹⁴The reference is to the Bulletins, Judge Advocate General of the Army.

vided for claims over that amount to be reported by the Secretary of War to Congress for its consideration. Its pertinent provisions were as follows:

“* * * the Secretary of War, * * * (is) hereby authorized to consider, ascertain, adjust, determine, settle and pay in an amount not in excess of \$500, * * * *any claim* against the United States * * * for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel * * * while acting within the scope of their employment, or otherwise incident to noncombat activities of the War Department or of the Army * * *.

“* * * . The Secretary of War may report such claims as exceed \$500 * * * to Congress for its consideration.”

This Act (sec. 1) specifically excluded from its coverage

“claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury or death occurs incident to their service.”

Since this Act covered both negligence and non-negligence claims against the Army, it provided (in Sec. 4) that the Small Tort Claims Act of 1922, *supra*, “shall hereafter be inapplicable to the War Department,” and that the Gunfire Act of 1912, *supra*, be repealed.

It further provided (in Sec. 6) that the Military Personnel Claims Act of 1921, *supra*, be amended to include within its coverage civilian employees of the War Department.

In 1945 (59 Stat. 662), the provisions of this Act (Military Claims Act of 1943) were extended to cover the Navy Department; and in 1946 (60 Stat. 332), the claim limitation was raised from \$500.00 to \$1,000.00.

Thereafter (until 1945), property damage claims of military personnel incident to service, but not covered under the Military Personnel Claims Act because of the exclusions and restrictions therein or in the Regulations thereunder, were not recoverable under the Military Claims Act of 1943 because of the specific exclusion of such claims therein; nor were they recoverable under the Small Tort Claims Act of 1922, because (since 1943) that Act was no longer applicable to the War Department. The following Judge Advocate General's opinion is illustrative of the rulings on such claims during this (1943-1945) period:

“Claim by an officer for value of damaged clothing. When claimant reported to the hospital with a skin disease, the medical officer ordered that his clothes be placed in an autoclave and disinfected. The clothing was rendered unserviceable. Claim disapproved. Held: The claim does not come within the scope of the act, 4 March 1921, as amended; and since the damage occurred incident to claimant's service, it is barred from payment under sec. 1, act of 3 July, 1943.” SPJGD 1943/D-1932, 19 February, 1944, 3 *Bull. JAG* 67.

(7) THE MILITARY PERSONNEL CLAIMS ACT OF MAY 29, 1945¹⁵ (59 Stat. 225).

This Act did two major things. *First*, it repealed the 1921 Military Personnel Claims Act and enacted a somewhat broader Military Personnel Claims Act. Its basic provisions were as follows:

“The Secretary of War, * * * (is) hereby authorized to consider, ascertain, adjust, determine, settle, and pay any claim against the United States, * * * of military personnel and civilian employees of the War Department or of the Army, when such claim is substantiated, and the property determined to be reasonable, useful, necessary, or proper under the attendant circumstances, in such manner as the Secretary of War may by regulation prescribe, for damages to or loss, destruction, capture, or abandonment of personal property occurring incident to their service, or to replace such personal property in kind; *Provided*, That the damage * * * shall not have occurred at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government.”

While this 1945 Act was broader than the 1921 Act, it still reposed complete discretion in the Secretary of War (now Defense Department) to reject or reduce any claim. And this Act and the Regulations adopted thereunder contained many exclusions and restrictions as to the type and amount of claims allowable and payable thereunder, although incident to service. The Act itself

¹⁵This is referred to by the District Judge as the third statute in the tripartite plan for handling all claims incident to activities of the War Department [Tr. 27-29]. The first step was the Foreign Claims Act (57 Stat. 66), *supra*, which is not pertinent here. The second step was the Military Claims Act of 1943, *supra*.

excluded losses occurring at quarters not assigned by the Government, and loss of property not "determined to be reasonable, useful, necessary or proper under the attendant circumstances." And the Regulations adopted by the Secretary of Defense excluded recovery for loss of jewelry, money (except limited amounts deposited for safekeeping), expensive articles, unnecessary property, motor vehicle damage (except in certain limited instances which may be presented for "consideration"), transportation and baggage losses not conforming to government requirements as to weight, etc., losses "which have been recovered or are recoverable from an insurer," etc. (32 C. F. R. 836.92-836.95, incl.); and since 1952, there is an overall limitation on any claim of \$2,500.00 (66 Stat. 321).

The *second* major change made by the Military Personnel Claims Act of 1945 was in Section 4 thereof,¹⁶ which amended the Military Claims Act of 1943 by deleting the exclusion from coverage under the latter act of property damage (but not personal injury) claims of military and civilian employees of the War Department, incident to their service. Thereafter, such property dam-

¹⁶Said Section 4 of the Military Personnel Claims Act of 1945 provided as follows:

"Sec. 4. That portion of section 1 of the Act of July 3, 1943 (cit.), reading as follows: 'The provisions of this Act shall not be applicable * * * to claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury, or death occurs incident to their service' is hereby amended * * * to read as follows: 'The provisions of this Act shall not be applicable * * * to claims for personal injury or death of military personnel or civilian employees of the War Department or of the Army if such injury or death occurs incident to their service.'"

age claims were cognizable under the Military Claims Act of 1943 as well as the Military Personnel Claims Act of 1945.

The opinion of the District Judge completely overlooked this portion of the Military Personnel Claims Act. In characterizing this Act as a “single comprehensive system for the reimbursement of military personnel and civilian employees of the War Department for all property losses incident to their service” [Tr. 27], the District Judge was no doubt misled by general language along those lines in House Report No. 237, 1945 Congressional Code Service 715, and in letters from the Secretary of War and the Judge Advocate General of the Army attached thereto, concerning the *proposed* Military Personnel Claims Act, and referred to by the District Judge in his opinion [Tr. 26].

A reading of said House Report and letters shows that the writers were concerned because military personnel (since 1943) no longer had coverage for negligent acts of the Army that damaged their property incident to service, under the Small Tort Claims Act of 1922, *supra*, or under the Military Claims Act of 1943, *supra*, and that it was their intent and desire to restore such rights to military personnel, as well as give them broader coverage under the proposed Military Personnel Claims Act of 1945. The following which is contained in both Secretary Patterson’s letter of 2/2/45 to the Speaker of the House and the letter of the Judge Advocate General attached thereto makes this clear:

“Perhaps the greatest injustice is being done to those persons who lose their clothes and personal effects in barracks fires. The second category of section 1, act of March 4, 1921, is very limited in

its scope. When a fire breaks out in barracks at night and a soldier is awakened in time to do nothing more than escape from the building and save his own life his claim cannot be paid * * * *even if the fire was caused by the negligence of Government personnel; their claims are not payable because they do not come within purview of the act of March 4, 1921, as heretofore construed, nor are such claims payable under the act of July 3, 1943, because the loss occurred incident to their service and such claims cannot now be paid under the act of December 28, 1922, because it is no longer applicable to the War Department.*"

This is further made clear by the following statement found in both of said letters:

"The purpose of the proposed legislation is to accomplish the following:

* * * * *

"3. *To authorize the payment of certain types of meritorious claims formerly payable under the act of December 28, 1922 (42 Stat. 1066; 31 U. S. C. 215-217), but not now payable due to the fact that the above statute is no longer applicable to the War Department and the claims in question are specifically excluded from the provisions of the act of July 3, 1943, and are not within the limited scope of the act of March 4, 1921, as amended.*"

Pursuant to the foregoing, Section 4 of the Military Personnel Claims Act (quoted above) was included in that Act *thereby making available to military and civilian personnel of the War Department the Military Claims Act of 1943 with respect to negligent and non-negligent property damage claims incident to service, thus restoring to them the rights they had previously had under the*

Small Tort Claims Act of 1922 and the Gunfire Act of 1912. *In short, in passing the Military Personnel Claims Act of 1945 Congress intended and provided that military personnel should have all the rights then accorded to civilians, for property damage losses incident to their service, as well as the additional rights provided by the Military Personnel Claims Act.*

That the foregoing analysis is correct appears from the following opinion of the Judge Advocate General of the Army (who, as noted above, was instrumental in the enactment (if he did not draft) the Military Personnel Claims Act of 1945):

“Hereafter follow the first decisions under the new regulations (A. R. 25-100, 29 May, 1945), interpreting the act of 29 May, 1945. Any decision on claims of military personnel or civilian employees which has heretofore appeared in the Digests or Bulletins should be carefully examined as to its applicability under the new statute and regulations before it may safely be regarded as authoritative. SPJGD/D-39091, 31 July, 1945.

“Scope.—Claim for damage to automobile. Claimant, an Army officer, while traveling in his automobile pursuant to temporary duty orders, suffered property damage as the result of the negligence of an Army truck driver acting within the scope of his employment. The claim had been disapproved for the sole reason that *the damage occurred incident to claimant's service*, and, therefore, could not be favorably considered under the provisions of the act of 3 July, 1943 (57 Stat. 372). The claim was considered under the provisions of the act of 3 July, 1943, as amended by sec. 4 of the Military Personnel Claims Act of 1945 (approved 29 May,

1945), and was allowed. *Held: The Military Personnel Claims Act of 1945 has repealed the prohibition contained in the act of 3 July, 1943 against the payment of claims of military personnel and civilian employees of the War Department or the Army for damage to or loss or destruction of property occurring incident to their service * * *. The claim, being in all other respects within the provisions of the act of 3 July, 1943, is now payable.*" SPJGD/D-36478, 31 July, 1945, 4 *Bull. JAG* 287.

Another Judge Advocate General ruling of interest involved a situation where a soldier in an Army hospital deposited \$321.20 with the hospital authorities for safe-keeping. The money was not returned to him. The loss was held incident to his service under the Military Personnel Claims Act but the Army Regulations under that Act limited his recovery to \$100.00. Held, he could claim and collect the full amount of his loss under the Military Claims Act of 1943:

"Secs. 1, 2, act of 3 July, 1943 (57 Stat. 372); Sec. 4, act of 29 May, 1945 (Pub. Law 67, 79th Cong. 59 Stat. 225); 31 U. S. C. 223b, 223c.

"Scope of act.—Claim for loss of property delivered to an Army hospital. Claimant deposited with proper military authorities in the hospital French francs worth \$321.20 * * *. He was given a receipt, but the property was never returned to him * * *. The claim was filed under AR 25-100 (Military Personnel Claims Act), but was considered under the provisions of AR 25-25 (Military Claims Act), since, in the absence of special circumstances not shown in this case, money claims under AR 25-100 will be limited to \$100 or one month's pay, whichever is greater. Claim approved for \$321.20. Held:

The delivery of the French francs to authorized military personnel constituted a bailment to the Government. The claim is therefore payable without regard as to the cause of the loss. The limitation of \$100 or one month's pay as applied to claims under AR 25-100 is not controlling in claims settled under AR 25-25. * * *." SPJGD/D-186805, 2 February, 1946; SPJGD/D-202385, 4 April, 1946, 5 *Bull. JAG* 68.

These rulings are illustrative of a uniform line of decisions by the Judge Advocates General of the armed services since the Military Personnel Claims Act of 1945 holding that military and civilian personnel of the services are not restricted to the Military Personnel Claims Act for property damage losses incident to their service, but have available to them the additional claims provisions applicable to civilians generally. And since Congress has appropriated the funds with which such claims have been paid over the years, it must be deemed to have approved of such construction of unambiguous language contained in its own statute.

(8) THE FEDERAL TORT CLAIMS ACT OF 1946.
(60 Stat. 842).¹⁷

In 1946 the same (79th) Congress that passed the Military Personnel Claims Act of 1945, passed the Federal Tort Claims Act. Section 921 of the Act provided

¹⁷The Federal Tort Claims Act was originally enacted by the 79th Congress as Title IV of the Legislative Reorganization Act of 1946 (60 Stat. 842, Chap. 753, Tit. IV, Public Law 601). Those portions of the Act that were codified became Title 28, U. S. C. A., Sections 921 *et seq.* In 1948 (62 Stat. 982) and 1949 (63 Stat. 106) the codified sections were revised and became Title 28, U. S. C. A., Sections 1346, 2671-2680; but no substantive changes were made and we need not be concerned therewith.

for administrative settlement of claims not exceeding \$1,000.00:

“Sec. 921. * * * authority is hereby conferred upon the head of each Federal agency, * * * to consider, ascertain, adjust, determine, and settle *any claim* against the United States for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death, where the total amount of the claim does not exceed \$1,000, caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable * * * in accordance with the law of the place where the act * * * occurred.”

Section 931 of the Act provided that suit may be brought against the Government in the District Court on all claims whether for more or less than \$1,000.00:

“Sec. 931. * * * the United States district court * * * shall have exclusive jurisdiction to hear, determine, and render judgment *on any claim* against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. * * * the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to

the same extent as a private individual under like circumstances. * * *

As noted by the District Judge [Tr. 28] “Sec. 424¹⁸ of the Tort Claims Act repealed all previous statutes which authorized the administrative adjustment of claims for property losses due to the negligence of government employees, if such claims were cognizable under the Tort Claims Act. The Military Claims Act of 1943 * * * was one of the statutes specifically repealed *pro tanto*.” Said section also specifically repealed the Small Tort Claims Act of 1922. Section 424 further provided that said statutes remained in force to the extent not covered by the *pro tanto* repeal. In other words, the net effect was that the Military Claims Act of 1943 remained in force only as to non-negligence claims, and negligence claims previously cognizable thereunder were transferred to the Tort Claims Act. On the other hand, the Small Tort Claims Act was completely repealed by Section 424, since it only covered negligence claims, and all claims theretofore cognizable under it were transferred to the Tort Claims Act.

One of the purposes of the Tort Claims Act was to remove from Congress the burden of entertaining private claim bills and Section 131¹⁹ of the Act provided that:

“No private bill * * * authorizing or directing (1) the payment of money for property damages * * * for which suit may be instituted under the * * * Act * * * shall be received or considered in either the Senate or the House of Representatives.”

^{18, 19}The reference is to Public Law 601, as this section of the Act has never been codified.

The Act (Sec. 943) contained 12 categories of excepted claims but none of them are relevant to the issues herein.

Bearing in mind that at the time the Tort Claims Act was enacted, property damage claims of military personnel incident to service were covered under the Military Claims Act (both administratively and as to the Congressional bill provision thereof), and also under the Military Personnel Claims Act; that such double coverage had been specifically and intentionally provided for by the same Congress that passed the Tort Claims Act for the specific purpose of broadening the claim rights of military personnel for loss of property incident to service; that the Military Claims Act of 1943 and the Tort Claims Act contain almost identical language as to claims covered, to wit, “*any claim* against the United States * * * for damage to or loss or destruction of property * * *” (Military Claims Act); “*any claim* against the United States for money only * * * on account of damage to or loss of property * * *” (Tort Claims Act); the *pro tanto* repeal as to negligence claims cognizable under the Military Claims Act and the transfer of such claims to the Tort Claims Act; and the Congressional intent thereby to eliminate presentation of tort claims by Congressional bill; it is submitted that the only reasonable conclusion is that in enacting the Tort Claims Act Congress intended to include thereunder property damage claims of military personnel incident to their service. For a case construing the Military Claims Act of 1943 and the Tort Claims Act and reaching that precise conclusion in an analogous situation, see *Samson v. United States* (S. D., N. Y.), 79 Fed. Supp. 406, discussed in detail, Point I, (c), *infra*.

The claims sued upon here arose out of noncombat activities of the Air Force and after passage of the Military Personnel Claims Act of 1945, they were cognizable under the Military Claims Act. And since they are based on negligence, upon passage of the Tort Claims Act, they became cognizable under that Act.

The processing by the Defense Department since passage of the Tort Claims Act of negligently caused property damage claims of service personnel incident to their service under the Tort Claims Act confirms the construction here urged by appellants. And since Congress has appropriated the money used by the Defense Department to pay such claims, it must be deemed to have approved thereof. The following Judge Advocates General opinions illustrate the foregoing.

The Judge Advocate General of the Air Force has ruled that where money is lost by a soldier *incident to his service*, claim may be made therefor under the Tort Claims Act (Air Force Reg. 112-4) (negligence), Military Claims Act of 1943 (Air Force Reg. 112-3) (non-negligence), or the Military Personnel Claims Act (Air Force Reg. 112-7):

“Although par. 3(b)(5), AFR 112-7, provides for reimbursement for currency only in specific and limited circumstances, in proper cases such claims may be approved under any of the categories enumerated in par. 3 of this regulation, except when a determination is made that they are barred by par. 5a, or involve transportation losses (par. 3b (2)). money lost (stolen) while traveling under orders is not considered reimbursable in view of EO 10053 and AFR 75-30 (5 Bull. JAG 98). *Prior to the enactment of the Federal Tort Claims Act certain claims for money losses were considered cognizable*

under the Act of July 3, 1943, when not payable under the Military Personnel Claims Act (par. 15), but since then such claims may be cognizable under either act, depending upon the factual situation involved. For example, a claim for money deposited at an Army hospital was presented by a soldier patient but since the amount involved exceeded the amount determined to be reasonable under the regulation, payment was made under the Act of July 3, 1943 (5 Bull. JAG 68).²⁰ Accordingly, there is a marked distinction between the items of property for which payment may be made under AFR 112-3, AFR 112-4 and AFR 112-7, inasmuch as the Military Personnel Claims Act and AFR 112-7 limits the type and kind of property claims that may be presented thereunder (par. 3, AFR 112-7), whereas no such restrictions are now contained in either of the other acts (par. 15, AFR 112-3; par. 15, AFR 112-4).” Op. JAGAF 1952/18, 11/19/51, 1 *Dig. Ops.*,²¹ Sec. 95.7 (Claims), p. 71.

The following opinions all involve property damage claims which were incident to service under the Military Personnel Claims Act of 1945²² [See Footnote 6, Opinion of District Judge, Tr. 33], where the Judge Advocate General of the Air Force ruled that, if negligence existed, the claims were cognizable under the Tort Claims Act:

“Para. 286. Bailment—trailer left in parking lot at military base. Wheels and tires were stolen from

²⁰Cited in this Brief, *supra*.

²¹ *Dig. Ops.* refers to Volume 1 of the Digest of Opinions of the Judge Advocates General of the Armed Forces recently published.

²²The 1945 Act did not change the meaning of “incident to service” as used in the prior Military Personnel Claims Acts. It merely broadened the type of such claims that would be paid.

the claimant's automobile trailer, which was parked at his convenience in an approved parking lot at a Texas Air Force base. *No bailment to the government was shown or proof of negligent, wilful or wrongful acts of government agents.* Accordingly, the claim was properly disapproved. (Citing AFR 112-3; AFR 112-4 (Tort Claims Act); AFR 112-7; (cits.))” Op. JAGAF 1950/69, 1 June 1950, 2 *Dig. JAGAF* 6.²³

“Sec. 95.5. Motor vehicles.

The claimant was assigned government quarters in a building on an air base and was authorized to park his car in a basement garage below. A fire of ‘unknown’ origin broke out in the basement of this building. As a result, the claimant's automobile was destroyed to such an extent that it would have to be sold for salvage and a set of golf clubs and a golf bag stored in the car were damaged to such an extent that they were of no further use to the claimant. In addition, clothing located in the claimant's quarters above the garage were damaged by smoke, necessitating dry cleaning. HELD: The claim for the loss of the automobile and golf equipment is cognizable but not payable under AFR 112-3 and the Act of July 3, 1943 (57 Stat. 372; 31 U. S. C. 223b), for the reason that the property was not bailed to the government at the time of the loss. While claimant was permitted to park his car in the garage, it was for his own convenience and at his own risk, except for loss or damage caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their employment (38 Am. Jur. 767). *But no evidence of*

²³Reference is to Digest of the Judge Advocate General of the Air Force.

tort liability was adduced (28 U. S. C. 2672 (Tort Claims Act)) and such a loss was not incident to 'noncombat activities' within the meaning of AFR 112-3, par. 4e (7 Bull. JAG 193). Moreover, that part of the claim covering the automobile and the golf equipment which was in the automobile at the time of the fire, is not payable under the Military Personnel Claims Act of 1945 (31 U. S. C. 222c) and AFR 112-7, as the property was not destroyed 'at quarters' or while in government 'custody' (par. 3b(1), AFR 112-7). Furthermore, claims for motor vehicles are ordinarily not paid under such Act and claimant's loss does not fall within the exception provided (par. 3b(4) and 4g, AFR 112-7). However, that part of the claim for the cost of dry cleaning of claimant's clothing is approved, in accordance with the provisions of the Military Personnel Claims Act of 1945 and AFR 112-7, par. 3b(1), even though the cost for such dry cleaning is not substantiated by a receipted bill, as the claim appears credible." Op. JAGAF 1951/100, 26 July 1951, 1 Dig. Ops., Sec. 95.5, p. 70 (Claims).

"Sec. 93.9. Fire, flood, or other serious occurrence.

The claimant occupied assigned quarters at an Air Force Base in the Canal Zone. The wooden wall cabinet in the kitchen of his quarters suddenly fell away from the wall, thereby breaking the china and glassware stored in the cabinet, as well as articles on the drainboard beneath the cabinet. The facts showed that the cabinet had been anchored to the wall with four nails near its base when installed several years before; however, inspections during use had not revealed any defects. Moreover, the overloading of the cabinet appears to have been a contributing factor in the accident. *Held: Claim for*

the loss of personal property is disapproved because the property was not damaged or destroyed by 'fire, flood, hurricane or other serious occurrence' while located in assigned quarters (par. 3b(1), AFR 112-7, 15 February 1950). In this connection, the occurrence that caused the damage is not the type of incident that is considered to be a serious occurrence because it has been construed to mean an occurrence similar in character to those specifically mentioned, *i.e.*, typhoon, cloudburst, earthquake, explosion, etc. (7 Bull. JAG 89). Furthermore, although the Military Personnel Claims Act of 1945, as amended, and AFR 112-7, no longer limits recovery to *rigid categories* of claims enumerated therein, and any claim falling within the general statutory provisions thereof, not specifically excluded by statute or regulation, may be submitted for consideration and in proper cases approved for payment, *this claim does not appear to be the type of 'meritorious' claim that falls within the spirit of the statute* (par. 3a, AFR 112-7), *because recovery is predicated solely on the negligent or wrongful act or omission of government employees. Accordingly, in the continental United States and its territorial possessions, including the Canal Zone, the Federal Tort Claims Act and AFR 112-4 are preemptive in such circumstances* (28 U. S. C. 2671-80). However, in either event, the overloading of the cabinet would constitute negligence and thus preclude payment of the claim (par. 7, AFR 112-4 and par. 4L, AFR 112-7)." Op. JAGAF 1952/83, 12 September 1949, 2 *Dig. Ops.* No. 1, Sec. 93.9, p. 26 (Claims).

And the Army, Air Force and Navy Regulations²⁴ with respect to the Tort Claims Act, the Military Claims Act and the Military Personnel Claims Act clearly indicate that claims of military and civilian personnel for property damage losses incident to their service are cognizable under all three Acts.

For example, the Army²⁵ Regulations on claims (32 C. F. R. 536.1-29) contain the following pertinent provisions:

“Sec. 536.17. *Claims of or pertaining to military personnel or civilian employees—(a) Property claims—(1) Statutes and regulations.* Claims for damage to or loss or destruction of personal property of military personnel or civilian employees of the Department of the Army *occurring incident to their service* will be considered first under the provisions of Sec. 536.27 which, if applicable, take precedence over the provisions of Secs. 536.12 to 536.23. *Such claims* found not to be payable under the provisions

²⁴We do not have access to sets of the Regulations of the three services; however, they are published in the Code of Federal Register, Title 32. In that Title, the Army Regulations (AR) are in Part 536, Air Force (AFR) in Part 836, and Navy (NR) in parts 750 and 751. The cross references (between the Regulations and the Register) with respect to the three Acts we are concerned with are as follows:

Act	AR (32 C.F.R.)	AFR (32 C.F.R.)	NR (32 C.F.R.)
F.T.C.A.	25-70 (536.29)	112-4 (836.10-25)	? (750.1-16)
M.C.A.	25-25 (536.12-23)	112-3 (836.30-44)	? (750.17-25)
M.P.C.A.	25-100 (536.27)	112-7 (836.90-108)	? (751.1-32)

²⁵It is apparent that the Regulations of any of the three services are equally pertinent, since all are issued under authority of the President, and it may not be questioned that the claim rights of all military personnel are identical, regardless of the particular service to which they are assigned.

of Sec. 536.27 and claims for damage to or loss or destruction of personal property of all other persons, estates, public or private corporations, firms, partnerships, or other claimants may be payable under the provisions of Secs. 536.12 to 536.23, *except those cognizable under the Federal Tort Claims Act* as codified in the act of June 25, 1948 (62 Stat. 983; 28 U. S. C. 2672).

* * * * *

Sec. 536.27. (c) *Claims not payable.* Claims otherwise within the scope of paragraph (b) of this section are nevertheless not payable under the provisions of this section (*but see* Secs. 536.12 to 536.23, 536.25, 536.26 and 536.29) when the damage, loss, destruction, capture, or abandonment incident to the service involves any of the following:

* * * * *

10. Losses recoverable from insurer. Losses, or any portion thereof, which have been recovered or are recoverable from an insurer.

* * * * *

Sec. 536.29(1).

* * * * *

(12) Claims for personal injury or death of military personnel or civilian employees incident to their service are not payable under the provisions of this section. However, if otherwise allowable, claims for injury or death of such personnel not incident to their service are payable under these provisions.”

For substantially similar Regulations as to the Air Force see 32 C. F. R. 836.25, 836.30, 836.33, 836.44, 836.103, and as to the Navy see 32 C. F. R. 751.18.

(c) The Authorities Support the Foregoing Construction of the Tort Claims Act.

In *Samson v. United States, supra* (S. D., N. Y.), 79 Fed. Supp. 406, a soldier stationed at Fort Dix, while off duty, boarded an Army bus on the Post, and was injured (on the Post) as a result of the negligence of the driver. The Court held he was entitled to sue under the Tort Claims Act.²⁶ In deciding that the suit was cognizable under that Act, the Court noted that prior to that Act, this claim would have been cognizable under the Military Claims Act of 1943, although it was a personal injury claim, since it did not arise incident to the soldier's service; and since the Tort Claims Act took over negligence claims that had theretofore been cognizable under the Military Claims Act, it must have taken over this claim. Said the Court:

*"Section 424(a) of the Federal Tort Claims Act repealed prior miscellaneous methods of disposing of claims for personal injuries or death caused by the negligence of an employee of the United States while acting within the scope of his office or employment and specifically repealed among other acts, the Military (Personnel) Claims Act of July 3, 1943, (cit.). The Federal Tort Claims Act must therefore be construed in the light of the law which it supplanted. (Cits.) * * **

It is evident that since Congress (in the Military Claims Act) specifically excluded military personnel whose claims were based on personal injury or death which occurred incident to their (the claimant's)

²⁶Since the soldier was off duty, the decision is in accord with the rule announced by the *Feres* and *Brooks* cases, *supra*. It is cited with approval in footnote 2 of an annotation on the general subject here involved following the *Feres* case at 95 L. Ed. 161.

service, it must be that Congress considered military personnel whose claims were not incident to service and intended such claimants to be within the general coverage of the Act.

It is settled that that which is implied or is within the intention of the law-makers is as much a part of the statute as that which is expressed (cits.).

The Military Claims Act provided for claims by military personnel arising from injury or death sustained otherwise than as an incident to their services. These claims could be settled if claimant agreed to accept the prevailing limited amount. If the claimant, whether a member of the military forces or a civilian, had a claim exceeding the amount which the Secretary of War could settle, then the Secretary of War could report it to Congress so that Congress might take appropriate action in respect to a private claim bill. (Cit.)

Thus prior to the enactment of the Federal Tort Claims Act redress for the injury or death of a member of the military forces, as well as that of a civilian, might be had by means of a private bill if the injury or death had not been sustained as an incident to the injured or deceased person's services as military personnel or as civilian employees of the War Department or of the Army.

The Federal Tort Claims Act continued the authority of heads of Federal agencies to settle claims up to the amount of \$1,000. But it added a new right, namely—where the tort claim exceeded that limit, the claimant might bring suit against the United States on a claim arising out of the negligent act of a Government employee while acting within the scope of their office or employment, under circumstances where the United States, if a private

person would be liable, and where, until the passage of this Act, the claimant would have had to resort to a private claim bill of Congress. * * *

The Senate Committee in its report said—“This title waives with certain limitations governmental immunity to suit in tort and permits suits on tort claims to be brought against the United States. It is complementary to the provision in Title I banning private bills and resolutions in Congress, leaving claimants to their remedy under this Title.” (Cit.)

When Congress repealed the Military Claims Act it is evident that Congress intended that a claimant who was eligible to seek redress by way of a private claim bill now might sue under the Federal Tort Claims Act if claimant fulfilled the other conditions.
* * *.”

And since the claims here sued upon were expressly cognizable under the Military Claims Act (administratively if not over \$1,000, and by Congressional bill if over \$1,000) prior to enactment of the Tort Claims Act, such claims became cognizable under the Tort Claims Act upon the enactment of that statute.

Likewise pertinent is the decision of this Court in *Employers' Fire Ins. Co. v. United States* (C. A. 9), 167 F. 2d 655, which was the first appellate decision holding subrogated claims to be cognizable under the Tort Claims Act. In so holding, this Court attached importance to the fact that subrogated claims had been allowed under the Small Tort Claims Act of 1922, which, as we have seen, was one of the Acts replaced by the Tort Claims Act:

“The narrow construction urged by the Government finds no basis in the legislative history of the

Federal Tort Claims Act nor in a comparison with analogous federal legislation. Prior to the enactment of the Federal Tort Claims Act, certain categories of claims, not in excess of \$1,000, were disposed of administratively by virtue of the Small Tort Claims Act. Claims in excess of \$1,000 were presented directly to Congress. The Small Tort Claims Act provided that the head of each department could determine any claim 'on account of damage to or loss of privately owned property where the amount of the claim does not exceed \$1,000.' In connection with this language, the problem arose as to whether subrogated claims were included, and the Attorney General, on June 29, 1932, rendered an opinion that claims of subrogees were covered by the statute. (36 Op. Atty. Gen. 553.) This interpretation of language nearly identical to that employed in the Federal Tort Claims Act was consistently followed by Congress in appropriating sums for the payment of subrogated claims thus certified; * * *. *It does not seem reasonable to suppose Congress intended to transfer the power of determining original claims to the Federal Courts and to retain for itself the determination of claims of subrogees.* * * *²⁷

And so in the instant case, "it does not seem reasonable to suppose" Congress intended to transfer the power of determining all negligence claims cognizable under the Military Claims Act of 1943, except service connected property damage claims of military personnel, to the Federal Courts, and to leave only such latter claims still to

²⁷When this same question later came before the Supreme Court in *United States v. Aetna Cas. & Surety Co.*, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171, that court used similar reasoning and reached the same conclusion (p. 183 of 94 L. Ed.).

be determined under the Military Claims Act, administratively if not over \$1,000.00 and by Congressional bill if over \$1,000.00.

**(d) The Construction Urged by Appellants Is Consistent
With the *Feres* Case.**

The *Feres* case dealt with service connected personal injury claims, whereas here we are dealing with property damage claims. In all the history of the various Federal claims statutes, no provision was made for payment of service connected personal injury claims; the reason no doubt being, as noted in the *Feres* case,²⁸ that Congress had provided "systems of simple, certain and uniform compensation for injuries or death of those in armed services." The Gunfire Act of 1912 and the Small Tort Claims Act only covered property damage claims. As we have seen service connected property damage claims were held to be cognizable under both of those Acts. While the Military Claims Act of 1943 covered both personal injury and property damage claims, it specifically excluded service connected personal injury claims. On the other hand, it specifically included (since 1945) service connected property damage claims. So for the past 40 years (except for the 1943-5 period) there has been a consistent Congressional policy of recognizing service connected property damage claims under the general claims acts applicable to civilians generally, and of excluding service connected personal injury claims therefrom.

In the *Feres* case, the Supreme Court specifically pointed out the above situation with respect to non-recog-

²⁸This phase of the problem and the *Feres* case will be further discussed under Point II, *infra*.

nition of service connected personal injury claims as one of the grounds of its decision (pp. 159-160 of 95 L. Ed.):

“No federal law recognizes a recovery such as claimants seek. The Military (Personnel) Claims Act, 31 USCA, Sec. 223(b), FCA, title 31, Sec. 223(b) (now superseded by 28 U. S. C. A., Sec. 2672), permitted recovery in some circumstances, *but it specifically excluded claims of military personnel ‘incident to their service.’*”²⁹

It seems proper to comment with respect to the foregoing that where the converse is true, and for many years “federal law recognize(d) a recovery such as claimants seek,” such recognition is strong evidence of a Congressional intent to continue to recognize such claims after the passage of the Tort Claims Act; especially where the very statutes that recognized such right of recovery were superseded (*pro tanto*) by the Tort Claims Act.

²⁹The reference to the Military Personnel Claims Act was no doubt inadvertent, as the citation is to the Military Claims Act, which is obviously what the court is referring to. Likewise, the statement that the latter act was superseded by the Tort Claims Act was not entirely accurate, since the repeal was only partial (as to negligence claims). This was specifically noted by the Judge Advocate General of the Air Force in commenting on this portion of the *Feres* case (2 Dig. JAGAF 3). Likewise, the reference by the Court to claims excluded under the Military Claims Act must be deemed to be to personal injury claims, with which the Court was concerned, and not to property damage claims.

II.

It Is Contrary to the Intent of Congress and the Rule of the Feres Case to Hold That Claimants Whose Claims Are Excluded From the Military Personnel Claims Act Are Without a Remedy.

We have heretofore pointed out (Point I, *supra*) that it was the intent of Congress that service connected property damage losses of military personnel caused by negligence of the Government be cognizable under the Tort Claims Act, regardless of whether they may also be covered by the Military Personnel Claims Act. However, the District Judge not only reached a contrary conclusion, but went further and held that such claims were not cognizable under the Tort Claims Act even though they were excluded from coverage under the Military Personnel Claims Act, thus leaving the claimants without any remedy.

(a) The Claims Here Sued Upon Were Excluded From the Coverage of the Military Personnel Claims Act Because of the Insurance Exclusion and the "Quarters" Exclusion.

These claims were not payable under the Military Personnel Claims Act because of the express exclusion contained in Air Force Regulations, Title 32, C. F. R., Sec. 836.93, entitled "Claims not payable":

"Claims otherwise within the scope of Sec. 836.92 are nevertheless not payable * * * when the damage * * * incident to service involves any of the following:

* * * * *

"(j) Losses recoverable from insurer or carrier. Losses or any portion thereof, which have been

recovered or are recoverable from an insurer or a carrier.”

The reason for this exclusion no doubt is that the Act is an act of grace, and not predicated upon fault on the part of the Government; hence there is no basis for allowance of subrogated claims, or for paying the soldier where he has insurance. To this effect, see:

Op. JAGAF 1950/91, 9/18/50, 2 *Dig. JAGAF* 8, Sec. 384.

Conversely, it is settled that subrogated claims based on negligence of the Government are cognizable under the Tort Claims Act³⁰

Employers' Fire Ins. Co. v. United States, supra, (C. A. 9), 167 F. 2d 655;

United States v. Aetna Cas. & Surety Co., supra, 338 U. S. 366, 70 S. Ct. 207, 94 L. Ed. 171.

These claims were likewise excluded from the coverage of the Military Personnel Claims Act by virtue of the exclusion *in the Act itself*³¹ of losses occurring “at quarters occupied by the claimant * * * which are not assigned to him or otherwise provided in kind by the Government * * *.”

³⁰Subrogated claims were also cognizable under the Small Tort Claims Act (see *Employers' Fire Ins. Co. v. United States, supra* (C. A. 9), 167 F. 2d 655); and under the Military Claims Act (see Title 32, C. F. R., Secs. 536.22, 836.41).

³¹Since this exclusion is in the Act itself, it could not be modified by the Regulations (which in any event do not purport to modify it), nor by any administrative action of the Air Force in allowing certain uninsured claims of the service personnel here involved.

The point in question would appear to be entirely settled by the Stipulation of Facts which provided in this regard [Tr. 15]:

“That the military personnel living in the Trailer Park * * * were entitled to and drew the same quarters’ allowances for quarters from the Government under the laws and regulations³² prescribing the same *in lieu of* allowances as military personnel *living off the base, or the furnishing of government-owned quarters* to military personnel and their dependents by the government.”

In addition, the personnel were required to pay rent to the Government for the space occupied [Tr. 16].

Nevertheless, the District Judge held [Tr. 36] that the *piece of ground* assigned for the parking of the trailer constituted “assigned quarters” within the Act. It is submitted that such construction of the words “assigned quarters” is untenable.

Webster’s New International Dictionary, 2d Ed., Unabridged, defines “quarter” (noun) as:

“9. * * * (b) Place of *lodging* or temporary residence; *shelter*—usually in pl.; as, the army was in winter quarters * * *.”

And “quarter” (verb) is defined as:

“2. To *shelter* * * *; esp., to assign to a certain place of *shelter*, as soldiers * * *.”

³²The Pay Readjustment Act of 1942 (56 Stat. 359) provided: “Sec. 10. To each enlisted man *not furnished quarters* or rations, there shall be granted, under such regulations as the President may prescribe, an allowance for quarters and subsistence.”

And by Executive Order 9206, 7 Fed. Reg. 5851, the President prescribed such allowances to, “enlisted men of the Army * * * *who are not furnished quarters*. * * * *in kind* * * *.”

And *State v. French* (N. Mex.), 99 P. 2d 715, 722, defined “quarters” as follows:

“What is the meaning of the term ‘quartering’ of troops? ‘Quarter’ in a military sense has become the usual term applied to stations, buildings, lodgings, etc., in the regular occupation of military troops * * *.”

It is submitted that the “quarters” of the personnel involved here were their house trailers, which belonged to them and hence were not “assigned” by the Government. Under no circumstances could the ground upon which the trailer was parked, and for which a rental was charged, be regarded as “quarters” or “assigned quarters” within the meaning of the Act. The losses to the trailers were therefore excluded from coverage by the express terms of the Act, regardless of whether they were insured.

In connection with these two exclusions, it is important to bear in mind that these are but two of a great many exclusions and restrictions in the Act and the Regulations thereunder. As we have noted above, the Regulations also exclude or restrict recovery for money, jewelry, motor vehicles, expensive articles, unnecessary property, transportation and baggage losses, etc. (32 C. F. R. 836.92-836.95).

It is submitted that there is not the slightest difference, legally, as to any of these exclusions and restrictions, including the insurance exclusion, in determining whether a claim that is excluded or restricted under the Military Personnel Claims Act, is cognizable under the Tort Claims Act. The District Judge purported to limit his decision to the insurance exclusion and stated it was “unnecessary” to decide what the result would be if a

soldier were personally bringing the suit and one of the other exclusions or restrictions were applicable [Tr. 29, 36]. And yet, the very fact that the District Judge found it necessary to discuss the "quarters" exclusion and find it inapplicable is a strong indication that the scope of the decision cannot be confined to the insurance exclusion; else what difference would it have made to the decision whether the "quarters" exclusion (or any other exclusion³³) was applicable or inapplicable, since the insurance exclusion was unquestionably applicable.

Congress could not have intended that of all the claims incident to service that are excluded or restricted under the Military Personnel Claims Act, only insurance companies would be without a remedy for negligently caused damage under the Tort Claims Act, and that such remedy would be permitted with respect to all other excluded and restricted claims. Such construction is without reason or basis and contrary to the general recognition of subrogated claims under the Tort Claims Act where the Government has been negligent. While the District Judge attempted to restrict his ruling to insurers and leave undecided the general question of the rights of service personnel under the Tort Claims Act where their claims are excluded or restricted under the Military Personnel Claims Act, it is submitted that if this decision is permitted to stand, it must apply equally to the millions of military and civilian personnel of the Defense Department, and result in greatly restricting their claim rights. That this is so follows from the very

³³As noted above it is not possible to determine, as the District Judge did, that these claims, if uninsured, would have been paid in whole or in part, because of the motor vehicle, expensive article, discretionary amount of allowance exclusions and restrictions.

premise upon which the District Judge based his decision that these insurance claims here sued on are not cognizable under the Tort Claims Act, viz., that “* * * property losses of *military personnel* incident to their service *are compensable exclusively* under the Military Personnel Claims Act * * *” [Tr. 29]; and that said Act is the “*single*” remedy of *military personnel* for property damage losses incident to service [Tr. 26, 29]. If this premise is correct, it must bar all such claims under the Tort Claims Act, be they of service personnel or subrogated insurers; but if it is incorrect (and we believe we have shown that it is), then such personnel would have the right to sue under the Tort Claims Act and so would their subrogated insurers. Since subrogated claims are cognizable under the Tort Claims Act, it is immaterial that such claims may be excluded under the Military Personnel Claims Act Regulations, since here the claims are brought on the basis of negligence under the Tort Claims Act, and not under the Military Personnel Claims Act.

(b) The Reason for the Rule of the Feres Case Is Inapplicable to Service Connected Property Damage Claims.

In the *Feres* case, one of the basic reasons stated by the Court for its decision was (p. 160 of 95 L. Ed.):

“This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. * * *

“* * * The compensation system, which normally requires no litigation, is not negligible or niggardly * * *. The recoveries compare ex-

tremely favorably with those provided by most workmen's compensation statutes. In the Jefferson case, * * * plaintiff received \$3,645.50 * * * and on estimated life expectancy * * * would prospectively received \$31,947 in addition. * * *."

The important part of the foregoing is the comment that these compensation, medical and hospital benefits are "simple, *certain*, and *uniform*." For example, Title 38, U. S. C. A., Section 471, providing for pensions for service connected death or disability states that "the United States *shall pay*" the benefits referred to; and the laws provide for a comprehensive system of adjudication and settlement of all such claims on a uniform basis with a right of appeal, so that as the Supreme Court noted the system "normally requires no litigation."

Such rights are not remotely comparable to benefits provided by the Military Personnel Claims Act, with its numerous exclusions and restrictions and discretion to reject or reduce any claim, and without right of appeal or suit. It is therefore not surprising that Congress has for many years permitted military personnel to assert rights for service connected property damage claims under the same statutes as are available to civilians generally, in addition to the limited relief afforded under the Military Personnel Claims Act.

The Supreme Court further noted in the *Feres* case that the Tort Claims Act "should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (p. 157 of 95 L. Ed.). The construction here urged by appellants is entirely consistent with the thought expressed in the forego-

ing quotation. Prior to the Tort Claims Act, military personnel were included within the scope of the various claims statutes, no doubt because of the many restrictions that have always been (and still are) contained in the Military Personnel Claims Act. And when the Tort Claims Act removed negligence claims from those prior statutes and put them under the Tort Claims Act, it is entirely consistent to apply such rights to military personnel. Where the loss is incident to service and without fault on the part of the Government, they have the restricted benefits of the Military Personnel Claims Act; but where the loss is due to negligence, the reason for the restricted rights granted by the Military Personnel Claims Act disappears, and they are entitled to make claim under the Tort Claims Act.

Another basic distinction between personal injury and property damage claims (implicit in the *Feres* case and also noted in the *Brooks* case), and that justifies different treatment thereof, is the possibility of double compensation if two remedies are available for personal injury claims, since the damages are unliquidated. In the *Brooks* case, in order to meet this problem, the Supreme Court directed the lower court to give the Government credit for the compensation, etc., benefits in making its general damage award, so as to prevent a double payment. But in the case of property damage, the article can only have one value and if the soldier has been paid for it under the Military Personnel Claims Act, he cannot make a further claim for it under the Tort Claims Act, or vice versa.

Congress in enacting the Tort Claims Act did not indicate a desire or intent to discriminate against military personnel and leave them without any remedy where the Government *negligently* damaged their personal property. It is submitted that such a harsh and unnecessary result should not be reached, in the absence of a clear expression by Congress that it so intended.

(c) The Federal Tort Claims Act Is Generally Given a Broad and Liberal Construction and to Do so Here Will Arrive at a Proper Result.

“The Federal Tort Claims Act waives the Government’s immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person. It does the same for an insurer whose claim has been subrogated to his. (cit.) * * *.

“This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years has recognized the Government’s obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. * * * Recognizing such a clearly defined breadth of purpose for the bill as a whole, and the general trend toward increasing the scope of the waiver by the United States of its sovereign im-

munity from suit, it is inconsistent to whittle it down by refinements.”

United States v. Yellow Cab Co., 340 U. S. 543,
71 S. Ct. 399, 95 L. Ed. 523.

And in footnote 5 of that case, the Supreme Court quoted the following from the opinion of this Court in *Employers' Fire Ins. Co. v. United States*, *supra* (C. A. 9), 167 F. 2d 655:

“Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule (of strict construction) cannot be had in order to enlarge the exceptions.”

In the words of the *Yellow Cab Co.* case, *supra*, to construe the Tort Claims Act to permit claims of military personnel for service connected property damage losses negligently caused to be asserted under that Act “does not subject the Government to a previously unrecognized type of obligation.” On the contrary, as has been pointed out, such claims were within the scope of the Military Claims Act (both as to the administrative and Congressional bill provisions thereof) and its predecessor statutes, which were replaced (as to negligence claims) by the Tort Claims Act.

III.

The Damage to the Trailers Was Not Service Connected Within the Rule of the *Feres* Case.

(a) The Facts.

The stipulation recites that the Trailer Park was operated by the Government as a “convenience and accommodation” for the personnel and their families; they were not required to live there, and were free to live off the Base; they paid rental for the space; none of the personnel involved had any duties with respect to the plane that crashed; they were off duty and off the base at the time the crash occurred [Tr. 13-16].

(b) The District Judge’s Ruling.

The District Judge concluded that the service-connected rule of the *Feres* case applied to property damage losses; that in determining whether the losses were service-connected in so far as the Tort Claims Act was concerned, the sole test was whether they were “incident to service” under the Military Personnel Claims Act; as he put it—

“* * * the key to the proper application of the term ‘incident to service’ to property losses is the Military Personnel Claims Act of 1945. [Tr. 26.]
* * * Since property losses of military personnel incident to their service are compensable exclusively under the Military Personnel Claims Act, that Act must be the guide in determining what losses are ‘incident to service.’” [Tr. 29.]

And he concluded that in determining whether a loss was “incident to service” under the Military Personnel Claims Act, the following was the test:

“* * * the term * * * was not employed in the statute in any restricted sense to require that a

compensable loss occur during the performance of military duties or on a military base. The term was used in a general sense merely to indicate that the loss must bear some substantial relation to the claimant's military service." [Tr. 34.]

Based on the foregoing, the District Judge concluded that the trailer losses were "incident to service" under the Military Personnel Claims Act, and hence *ipso facto* not cognizable under the Tort Claims Act.

(c) The Rule of the *Feres* Case.

As heretofore noted, the *Feres* case was preceded by the *Brooks* case. In the latter case, a soldier while on furlough was injured by a negligently driven Army truck. In upholding the soldier's right to sue under the Tort Claims Act, the Supreme Court stated (p. 1204 of 93 L. Ed.):

"But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."

In the *Feres* case (actually 3 cases), the claims involved negligent injuries to soldiers while on active duty; *e. g.*, in one case a defective heating plant in an Army barracks in which the soldier was quartered caused a fire; and in the other two cases, Army surgeons negligently operated on the soldiers in Army hospitals.

In the *Feres* case, the Court expressly approved the *Brooks* case but distinguished it upon the following grounds (p. 161 of 95 L. Ed.):

"The injury to Brooks did not *arise out of or in the course of military duty*. Brooks was on furlough

* * * under compulsion of no orders or duty and on no military mission. * * * Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders.

"We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen *where the injuries arise out of or are in the course of activity incident to service.*"

In *Herring v. United States* (Colo.), 98 Fed. Supp. 69, 70, the court discussed the *Feres* and *Brooks* cases and noted that the test to be applied *under the Tort Claims Act* as announced by those cases was as follows:

*"The determining factor appears to be the status of the injured party. Thus, the first fact pointed out by Mr. Justice Jackson in the Feres case is that the injured * * * parties * * * were soldiers on active duty.*

In *Brooks v. United States* (cit.), the United States Supreme Court allowed recovery to a soldier who received his injury while on furlough. If an injury which a soldier received during war time, while he was home on furlough (subject to military regulations and call at any time), does not arise out of and is not incidental to military service, * * *.

"This argument can be even further fortified by the fact that in the *Brooks* case, where recovery was permitted to a soldier, *the injury was caused by an United States Army truck.* This last factor, and the stress which the Supreme Court put on the distinction between a soldier on active duty and a soldier on furlough, *indicates that the source and circumstances of the injury are relatively unimportant in judicial determination whether the wrong arose out*

of or was incidental to military service. The Brooks case stands unimpeached and is as much the law of the land today as it was in 1949."

Nor is there any distinction made in applying the test of these cases as between whether the soldier was on *leave* or *furlough*. It was so held in *Brown v. United States* (S. D., W. Va.), 99 Fed. Supp. 685, 687, where a sailor, on a liberty pass, was killed while swimming in a pool on a navy base, and the right of his heirs to sue for wrongful death under the Tort Claims Act was upheld:

"It will thus be seen that so far as the Federal Tort Claims Act is concerned the Supreme Court uses the words 'on furlough' and 'on leave' as synonymous. In both cases the soldier is not on active duty, is not under compulsion of any orders or duty and is not on any military mission. He is free to go and do as he wishes."

It has also been held that the service-connected personal injury test of the right to sue under the Tort Claims Act *does not depend on whether the injury occurs on or off a military base.*

For example, in *Samson v. United States, supra* (S. D., N. Y.), 79 Fed. Supp. 406, 409, the right of a soldier to sue under the Tort Claims Act was upheld where he was injured at Fort Dix, where he was stationed, while riding on a bus provided by the Army during his off duty hours. Said the court:

"In the case at bar the deceased did not receive his injury as an incident to his service. At the time of his accident he was merely a passenger in a bus operated by the War Department. The fact that he was wearing his army uniform did not exclude him from his right to sue."

And see to the same effect, *Brown v. United States*, *supra*, 99 Fed. Supp. 685, where the sailor was killed while on a naval base.

(d) **The Damage to These Trailers Did Not “Arise Out of or in the Course of Activity Incident to the Service” of the Personnel Concerned.**

The foregoing cases all dealt with personal injury claims. Assuming for the sake of argument that the rule of the *Feres* case applies to property damage claims, should the test be any more stringent or restrictive than that applied to personal injury claims? It is submitted that reason and authority require a negative answer.

A factual situation similar to that here involved was considered in *Lund v. United States* (Mass.), 104 Fed. Supp. 756, where it appeared that a naval aviation officer on active duty, and going on an official flight, drove his private car to the air field and parked it in an authorized naval parking area. While so parked, and while the officer was on his flight, a navy plane negligently damaged the car. He sued to recover the damage to his car under the Tort Claims Act and was awarded a judgment. In so holding the court referred to the rules announced by the *Feres* and *Brooks* cases as to personal injury claims and then stated (pp. 757-758):

“This case differs on its facts since we are here concerned with damage to the *personal property* of a member of the armed forces rather than with personal injury or death.

The case is not without difficulty. It is clear, however, that the plaintiff had the right to and did select the means of transportation used by him to arrive at his duty station. He was required by the Navy to be at the Air Station on the critical date to

take a training flight, but the Government did not care whether he traveled there by street car, bus, or private vehicle. He chose to use his own automobile, which choice he made in furtherance of his own purposes. I conclude, therefore, that the use of the motor vehicle, and the act of parking it in a designated area were not 'incident to' his service, and that the *Feres* * * * decision, *supra*, does not bar recovery. The vehicle was not employed by him in the performance of his duties as a member of the Armed Forces, nor was it used by him during the time that he was engaged in performing those duties. The use of a privately-owned automobile does not 'arise out of the military service of the plaintiff.'

I conclude that the case is within the jurisdiction of this Court by virtue of the Federal Tort Claims Act, 28 U. S. C. A., Sec. 2671, *et seq.*; * * *."

It is submitted that the reasoning and conclusion in the *Lund* case are applicable to the instant case; in fact, if anything, the facts of the instant case present a stronger case for coverage under the Tort Claims Act. In the *Lund* case, the plaintiff was on active duty at the time of the accident and he had to get to the air field to make his flight, and the use of an automobile was a reasonable way to get there. But in the instant case, the stipulation permits the finding that the soldiers were off duty and off the Base on their own personal business at the time of the accident. To paraphrase the *Lund* case, "The Government did not care whether the soldiers lived in trailers or in houses, or on or off the Base." The choice to live in the trailers and to park them on the Base was "a choice which they made in furtherance of their own purposes."

The use of the trailers and the parking of them were not “incident to the service,” and “the trailers were not employed by them in the performance of their duties, nor were they used by them while performing their duties.”

The District Judge noted the decision in the *Lund* case, but refused to follow it for the sole reason that in that case “the court gave no consideration to the Military Personnel Claims Act” [Tr. 34]. There are several answers to this:

(1) As noted in Point I, *supra*, the Military Personnel Claims Act does not require a holding contra to the *Lund* case. Therefore, there was no occasion for the Court to consider that Act. In the *Lund* case, the Government apparently did not consider that Act pertinent or no doubt it would have called it to the attention of the Court, and it would then no doubt have been discussed in the opinion. It is also pertinent to note that the Government apparently did not consider the *Lund* decision to be incorrect as it took no appeal therefrom.

(2) The test of “incident to service” under the Military Personnel Claims Act is not the same as the service connected test of the *Feres* case with respect to the Tort Claims Act.³⁴

(3) The decision in the *Lund* case is sound and should not be summarily disregarded.

The soundness of the conclusion reached in that case finds support in several opinions of the Judge Advocates General of the Army and Air Force.

³⁴This point will be discussed further hereinafter.

HELD NOT INCIDENT TO SERVICE.

Army officer parked his car in an authorized parking lot on the Post and it was damaged by an Army truck. Held, car damage not incident to service.

2 *Bull. JAG* 274-275.

A soldier, off duty, was driving his car on the Post when it was hit by an Army truck. Held, car damage not incident to service.

4 *Bull. JAG* 62.

Officer, on leave, on way back to his station obtained a ride in an Army plane which crashed and damaged his personal effects. Held, damage not incident to service.

3 *Bull. JAG* 426.

Civilian Army instructor used his own radio equipment while teaching. When not using it he stored it in a building on the Post, where it was damaged in a fire. Held, damage not incident to service since he was not using the equipment at the time of the fire and because he was not required by the Army to use the equipment in his work.

4 *Bull. JAG* 185.

Civilian employee of Air Force kept his gauge tachometer in a locker furnished by the Air Force, where it was burned in a fire. Held, damage not incident to service, as the use of lockers, although authorized, was for personal convenience of the user, and the Government exercised no control over the property contained therein.

1 *Dig. Ops., Claims, Sec. 93.1, p. 63.*

Airman went swimming in Air Force pool and checked his watch in checkroom run by Air Force. He did not get it back. Held, loss not incident to service, because the soldier was using the facility for his convenience and pleasure while off duty.

2 *Dig. Ops.*, No. 3, Claims, Sec. 94.1, p. 15.

Air Force personnel sent clothes to Air Force laundry where it was lost. Held, loss not incident to service since the use of Air Force laundry by personnel is a privilege, which is granted as a matter of courtesy.

3 *Dig. JAGAF*, Claims, Sec. 21, p. 6;

1 *Dig. Ops.*, Claims, Sec. 94.3, p. 65;

1. *Dig. Ops.*, Claims, Sec. 94.3, pp. 68-69.

HELD INCIDENT TO SERVICE.

Army officer was driving his car *under orders* for a permanent change of station *which authorized travel by private conveyance*, when he was struck by an Army truck. Held, car damage incident to service.

3 *Bull. JAG* 521.

Army officer was traveling in his auto pursuant to *temporary duty orders* when hit by Army truck. Held, car damage incident to service.

4 *Bull. JAG* 287, *supra*.

The test announced by the *Feres* case is whether the injury "arises out of or in the course of military duty." A consideration of the foregoing cases and rulings justifies the conclusion that whether it be personal injury or property damage, it is not service connected if the soldier is *off duty* at the time of the injury or damage, *or* if he is merely making use, *for his own convenience*, of an

authorized Government facility *which he is not ordered to use, e.g., parking lot, storage locker, laundry, bus, swimming pool.*

Applying the foregoing to the instant case, we have present the following factors which justify the conclusion these losses were not service connected: the plane crash had nothing whatever to do with the soldiers' service, and the only reason the trailers were involved was because of the fortuitous circumstance that they were physically present near the place where the plane crashed; *the use of the trailer park was a courtesy and privilege offered by the Government for the convenience of the personnel which they were not ordered or required to use in connection with their service; the soldiers were off duty and off the Base at the time of the crash.*

We need only consider the situation that would exist if the crash had occurred off the Base to confirm the foregoing. The soldiers were free to live off the Base, and let us suppose they had their trailers parked in a private trailer park a mile from the Base, and that the plane crashed at that point and damaged the trailers. It is submitted that under no tenable theory would the losses in that situation be service connected within the rule of the above cited cases and rulings. And yet, whether the loss occurred on or off the Base, the trailers would be serving the identical function. And, as we have seen, the fact that the losses occurred on the Base and that the soldiers were using a Government facility (*e.g., parking lot, locker, laundry, bus, swimming pool*), here, a trailer park, at the time of the loss, does not make the losses service connected.

It is submitted that these losses did not "arise out of the service" within the meaning of the *Feres* case.

(e) The Military Personnel Claims Act Is Not the Test of Whether the Losses Were Service Connected.

The District Judge concluded that if these losses were incident to service within the Military Personnel Claims Act, they were *ipso facto* service connected under the rule of the *Feres* case. He apparently reached this conclusion because he had construed said Act to be the sole remedy of service personnel for such losses [Tr. 26, 29].

It is submitted that this is a *non sequitur*, especially since the premise upon which it is based is untenable. In passing the Military Personnel Claims Act, the Government was granting certain claim benefits to soldiers for losses for which the Government would not normally be liable, in the absence of such an Act. Liability was not conditioned upon a showing of fault. It may well be, as stated by the District Judge, that such an Act should be construed "liberally" [Tr. 33], and it is only necessary "that the loss must bear some substantial relation" to their service [Tr. 34], in order to come within the scope of the Act.

But the Tort Claims Act makes the Government liable only where it is negligent. Basically, it covers "any claim" of any person, subject to the restriction announced by the *Feres* case. In determining whether service personnel should be *deprived* of a right to make claim under that Act, entirely different considerations should govern than in determining whether a claim is *included* under the Military Personnel Claims Act. For example, in the *Brooks* case, *supra*, where a soldier was held entitled to sue under the Tort Claims Act where injured while on furlough, he had already been paid compensation benefits because his injuries were incurred "in line of duty" (38

U. S. C. A., Sec. 701), since a soldier injured on furlough is, for the purposes of the compensation, hospital and medical benefits statute, as much regarded injured "in line of duty" as one injured on active duty. So what may be deemed service connected for one purpose (compensation statutes), may not be service connected for another purpose (Tort Claims Act).

The Military Personnel Claims Act is far from a substitute for or analogous to the Tort Claims Act, and the statutory history of the two acts shows that Congress did not intend the Military Personnel Claims Act to be the sole remedy of service personnel for service connected property damage losses. Therefore, in determining whether a loss is service connected for purposes of the Tort Claims Act we should look at that Act, its legislative history and background, and the cases decided under it, and not be restricted or guided by whether a particular claim is incident to service under the Military Personnel Claims Act. The danger in doing the latter is well illustrated by the decision of the District Judge. Having determined that these losses were incident to service under the Military Personnel Claims Act (but excluded from coverage thereunder), he leaves the claimants without any remedy. Had he looked at the issue squarely as one arising under the Tort Claims Act, at the history of that Act and the Acts it supplanted, and the cases considering the issue under that Act, it is submitted that the conclusion would have been that these losses were not service connected, and that they were cognizable under the Tort Claims Act.

(f) **There Is No Issue of Estoppel Available to the Government.**

In the District Court the Government urged that appellants were estopped to deny that these losses were "incident to service," because the owners of the trailers had made claim under the Military Personnel Claims Act for certain uninsured losses and certain payments were made on such claims by the Government. The District Judge found it unnecessary to rule on this issue [Tr. 25-26].

Assuming the point is available to appellee on this appeal, it has no merit for the following reasons:

(1) The claim forms and approvals by the Government affirmatively show that the Government was fully apprised therein of all of the circumstances surrounding the losses, and that the insurers had already paid the trailer losses and were then the owners of all claims for damage thereto [Tr. 18-20].

Since the Government itself knew all the facts and necessarily made its own decision as to whether the claims were "incident to service," the basic elements of an estoppel are lacking. In any event, since the soldiers did not own the claims for the trailer damage at the time they filed their uninsured claims, the acts of the soldiers in filing such claims could not estop the insurers, who did not participate therein. For example, where a tort-feasor settles with an injured party and takes a full release with knowledge that an insurer has been subrogated to all or part of the claim, the release is not effective to bar the subrogation claim.

Mitchell v. Holmes, 9 Cal. App. 2d 461, 50 P. 2d 473;

29 *Am. Jur.* 1005-1006, Sec. 1344;

54 *A. L. R.* 1455;

105 *A. L. R.* 1433.

(2) The Air Force Regulations required the soldiers' claims to be filed first under the Military Personnel Claims Act, and then the Air Force was to determine whether the claims would be paid under that Act or one of the other claim statutes, *e.g.*, the Tort Claims Act (32 C. F. R., Sec. 836.103). In view of this requirement, no estoppel can be predicated in favor of the Government.

(3) A claim or finding of "incident to service" under the Military Personnel Claims Act is not a claim or finding that the claim is service connected under the Tort Claims Act.

(4) The Military Personnel Claims Act excludes claims that are recoverable from insurers, but such claims are cognizable under the Tort Claims Act. To permit the Government to administratively make a finding of "incident to service" without even giving notice or a hearing to appellants, and then to assert that such finding is binding upon them and operates to deprive them of their day in court, would be in violation of the most elemental concept of due process.

It is submitted that the judgment of dismissal should be reversed and the case tried on its merits.

Respectfully submitted,

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Attorneys for Appellants.

No. 13889.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' SUPPLEMENTAL BRIEF.

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FILED

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Appellants,

vs.

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Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' SUPPLEMENTAL BRIEF.

Appellants desire to call the Court's attention to the following cases decided since filing its Brief herein, and to reply to the Government's Supplemental Brief.

1. *United States v. Peter Brown*¹ (U. S. Supreme Court, decided 12/6/54, and reproduced in full in the Appendix hereto). In its Briefs (Govt. Br. pp. 10-15;

¹The Court of Appeals decision in this case was cited in Appellants' Reply Brief, footnote 5, page 10.

Supp. Br. p. 2), the Government took the position that the “*ratio decidendi*” of the *Feres* case was that the existence of a statutory compensation system precluded a soldier from suing under the Federal Tort Claims Act for service-incident personal injuries, such compensation system being the exclusive remedy for such injuries. From this premise, the Government concluded (p. 15) that the Military Personnel Claims Act must likewise be deemed to be the exclusive remedy for service-incident property damage claims.

In the *Brown* case, the Supreme Court declares that *Feres* did not so hold. To the contrary, that Court reaffirms its previous holding in *Brooks v. United States* that the compensation acts do not provide that they are and they were not intended as the exclusive remedy for injured service personnel.

In the *Brown* case, the Supreme Court states that the basis of *Feres* was “the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty” and because the Tort Claims Act was not intended “‘to visit the Government with novel and unprecedented liabilities.’”

It is submitted that the *Brown* case strengthens the contention of appellants (Appellants’ Br. pp. 41-42, 48-51), that nothing in *Feres* requires a holding that suit may not be brought under the Tort Claims Act for service-incident property damage claims. As pointed out in *Feres* (see Appellants’ Br. p. 42), the general claim statutes (including the Military Claims Act of 1943) have always excluded service-incident personal injury claims. On the other hand, for over 40 years the general claim statutes

were construed as including service-incident property damage claims. And such recognition was expressly provided for in Section 4 of the 1945 Military Personnel Claims Act, which specifically made the 1943 Military Claims Act applicable to service-incident property damage claims. And, in turn, the Tort Claims Act repealed (*pro tanto*), and took jurisdiction of negligence claims covered by, the Military Claims Act.

The Supreme Court was not legislating in *Feres*, but merely construing the Tort Claims Act in light of a long history with respect to service-incident personal injury claims. Since an entirely contrary history exists with respect to service-incident property damage claims, and Congress has for many years evidenced a clear intent to accord soldiers the same claim rights with respect to service-incident property damage claims as are accorded civilians, and such rights have been accorded for many years and can continue to be accorded without disrupting military discipline, *Feres* is not applicable. *Feres* was at pains to point out that the decision there reached was not unfair to soldiers, as the compensation system provided generous, uniform and certain benefits. But here, the Government is urging the application of *Feres* in order to sharply curtail claim rights of all Defense Department personnel. If *Feres* is applied to negligently caused service-incident property damage claims, there will be many such claims for which service personnel will be without any remedy. Such result should not be reached in the absence of a compelling reason therefor.

2. *Snyder v. United States* (U. S. D. C., Dist. Md.), 118 Fed. Supp. 585. Plaintiff husband was a Sergeant in the Air Force stationed at Bowling Air Force Base. He

and his wife (also a plaintiff) lived in a house near the Base. At a time when Sergeant Snyder was home on a liberty pass (not a furlough), a plane from the Base crashed into their house and injured the plaintiffs and damaged their household furniture and personal effects. They brought suit under the Federal Tort Claims Act to recover for personal injuries and property damage. The Government contended that the claim for property damage was not covered by the Federal Tort Claims Act and was compensable exclusively under the Military Personnel Claims Act. Chief Judge Coleman rejected this contention because (p. 588 of 118 Fed. Supp.):

“* * * that Act is not by its express terms applicable to the present case, since the house which was destroyed, together with personal property was not quarters ‘assigned’ to (Sergeant Snyder) incident to his military service. See *Fidelity-Phenix Fire Ins. Co. v. U. S.*, 111 F. Supp. 899.”

In other words, the Court ruled that property damage claims that were excluded from coverage under the Military Personnel Claims Act were covered by the Federal Tort Claims Act (see discussion of this precise point in Appellants' Br. pp. 43-52). The Government appealed from the *Snyder* judgment to the Court of Appeals for the Fourth Circuit.² An examination of the Government's Brief on said appeal discloses that the Government urged no error with respect to the above-mentioned construction of the Military Personnel Claims Act, the sole point urged on appeal being alleged excessive damages.

²We are advised the appeal was argued 11/18/54 and has not yet been decided.

3. *Barnes v. United States* (U. S. D. C., W. D., Ky.), 103 Fed. Supp. 51.³ A soldier, on pass (not furlough), while driving his automobile (not on the post) was negligently struck by a government vehicle. The Court rendered judgment under the Federal Tort Claims Act in favor of the soldier for both personal injury and property damage, including his auto and other personal property. We are advised that the Government took no appeal from this judgment.

4. *Zoula v. United States* (cited in Government's Supplemental Brief). The following comments appear to be pertinent with respect to this case.

(a) Throughout the opinion, the Court minimizes the holding in the *Brooks* case, and, in effect, states that the Supreme Court and other Federal courts have since disapproved of much of the language and reasoning of *Brooks*. In view of the decision of the Supreme Court in *United States v. Peter Brown* (*supra*), in which the holding and reasoning of *Brooks* is reaffirmed, it would seem that the weight that might otherwise be given to the *Zoula* opinion is considerably diminished.

(b) *Zoula* holds that an injury sustained by a soldier while on pass, since he is technically still *on duty*, is incident to service. While this conclusion appears questionable (see *Snyder* and *Barnes* cases, *supra*, and *Brown* and *Samson* cases, cited p. 56, Appellants' Br.), such holding necessarily distinguishes *Zoula* from the instant case. Here the stipulation provides that the soldiers were "off duty," which would be exactly opposite to *Zoula's*

³This case was decided prior to the filing of appellants' briefs but was inadvertently omitted therefrom.

construction of the status of a soldier on pass. For example, in *United States v. Peter Brown*, the dissent refers to the soldier in *Brooks* as being "off duty," when his status was actually on furlough, thus indicating the identity of the two.

(c) As to the personal property issue, *Zoula* merely cites the opinion of the District Court herein and concludes without any discussion or reasoning that the Military Personnel Claims Act is the exclusive remedy for service-incident property damage claims. It is submitted that in the absence of an indication that the Court considered⁴ the important questions of statutory history and the administrative and congressional interpretation and construction of the pertinent claims statutes, the *Zoula* opinion can hardly be considered an authoritative answer to the problems presented on this appeal.

(d) *Zoula* involved alleged service-incident damage to an automobile belonging to a soldier, and in reaching its conclusion, the court appears to rely entirely on the citation of the decision of the District Court herein. This confirms our contention (*Appellants' Br.* p. 47), con-

⁴We have examined the Appellants' and Government's Briefs in *Zoula*. As to the property damage issue the appellants devote only a page and a half which is restricted to the citation of and quotation from *Lund v. United States* (See Appellants' Br. herein, p. 57). The Government's Brief (filed several months after its brief was filed herein, and apparently prepared by the same lawyers who prepared its Brief herein) makes practically the same arguments as in the instant appeal. It entirely omits any reference to the statutory history and provisions of the various general claim statutes, or the administrative and congressional interpretation that they included service-incident property damages claims (See Appellants' Br. herein, pp. 11-43). And in reproducing what it claims to be the "pertinent part" of the Military Personnel Claims Act of 1945, it omits Section 4 thereof (which reinstated service-incident property damage claim rights under the Military Claims Act of 1943).

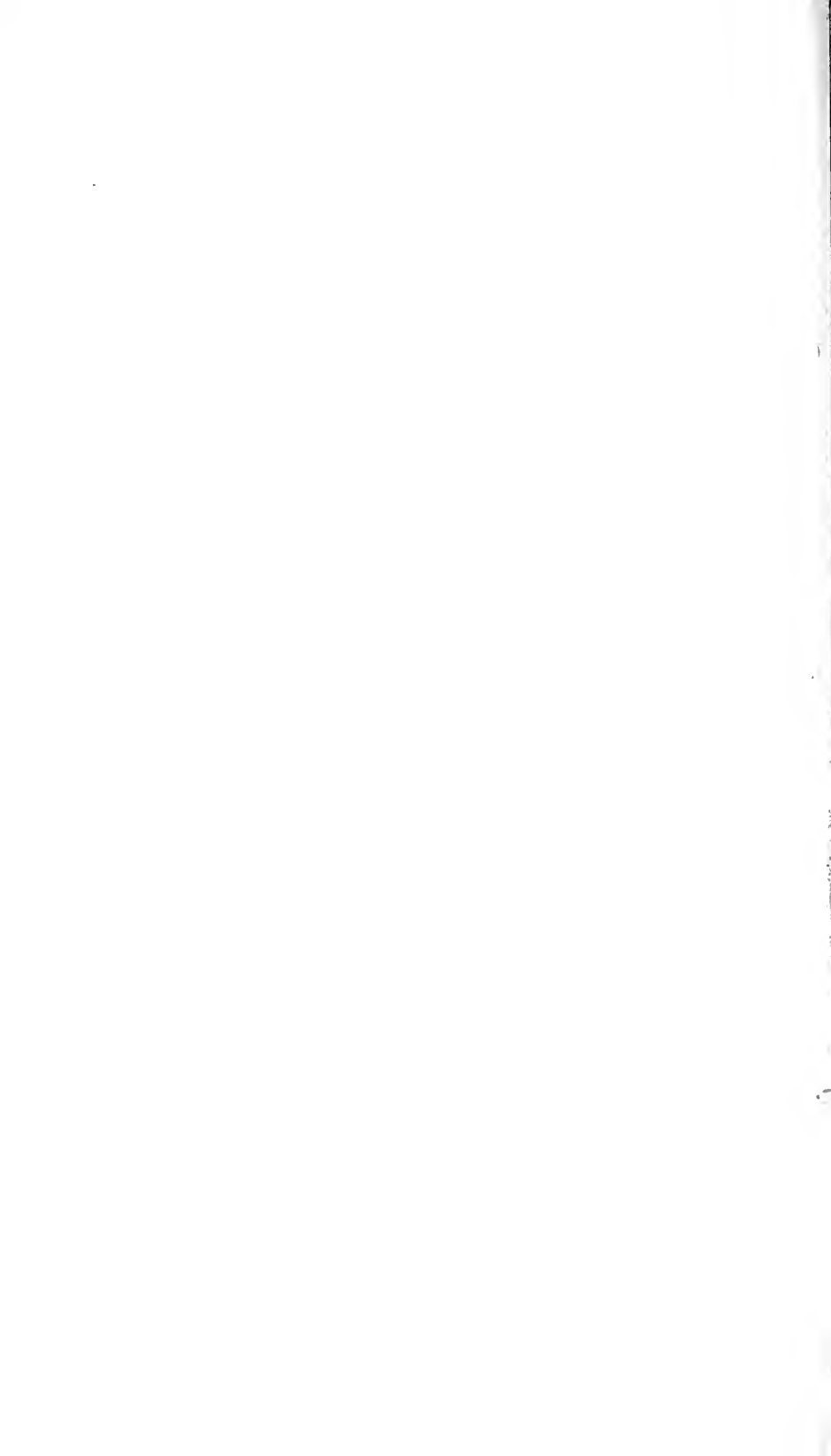
curred in by the Government (see Appellants' Rep. Br. p. 1), that the holding of the District Court herein is applicable to and greatly restricts the claim rights of all military and civilian personnel of the Defense Department. However, *Zoula* goes one step further than the District Judge desired to go herein, and applies the ruling of the District Court, without any discussion whatsoever, to a claim for damage to a motor vehicle, which claim is excluded from coverage under the Military Personnel Claims Act [Tr. 36]. The District Court herein attempted to leave this question undecided by his Opinion [Tr. 36]; but it would appear (based on the decision in *Zoula* and as contended in Appellants' Br. herein pp. 46-48), that the decision of the District Judge is, in fact, tantamount to a holding that *all* service-incident property damage claims are excluded from the Tort Claims Act, even though such claims are excluded from coverage or covered only on a restricted basis under the Military Personnel Claims Act.

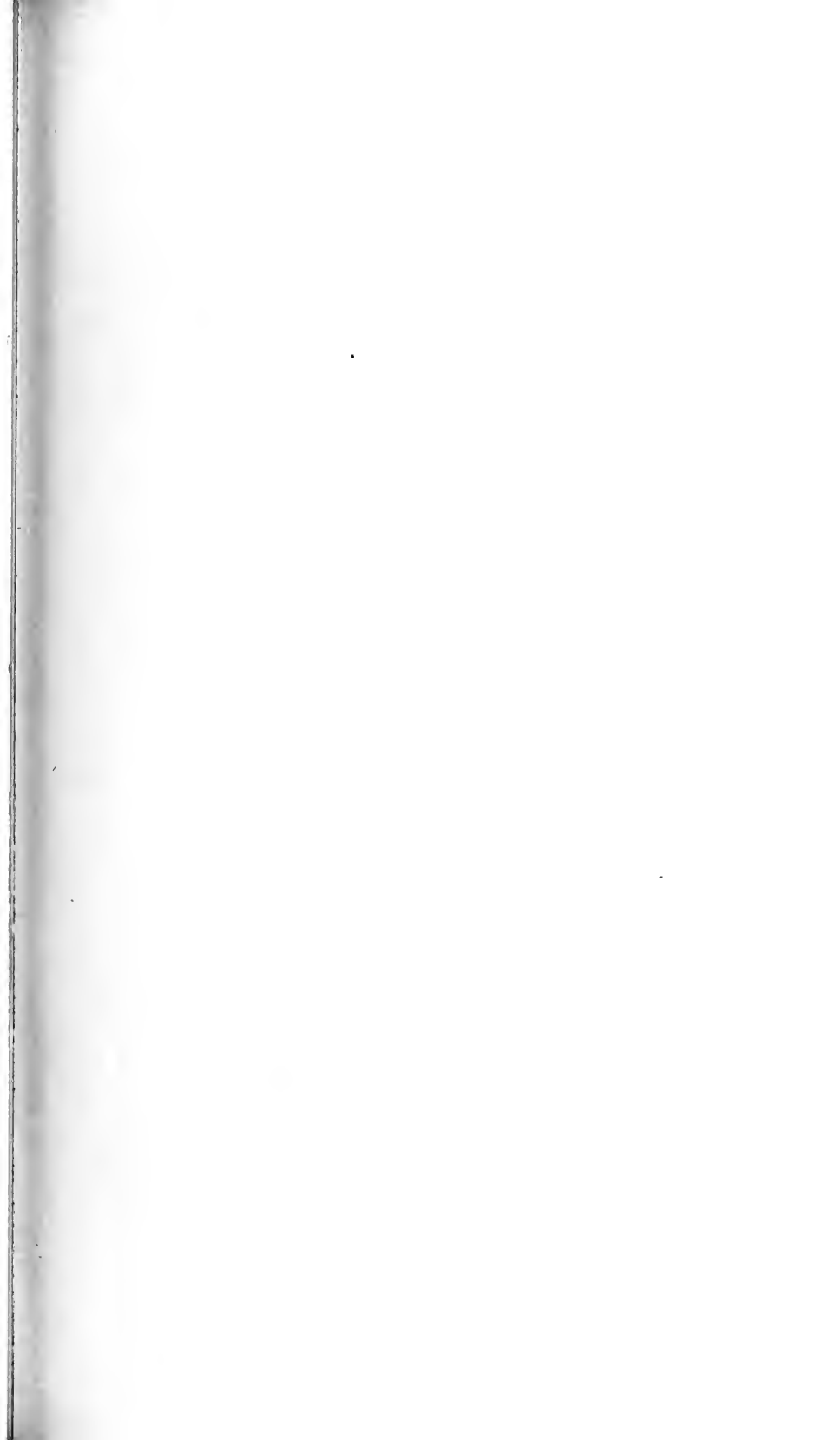
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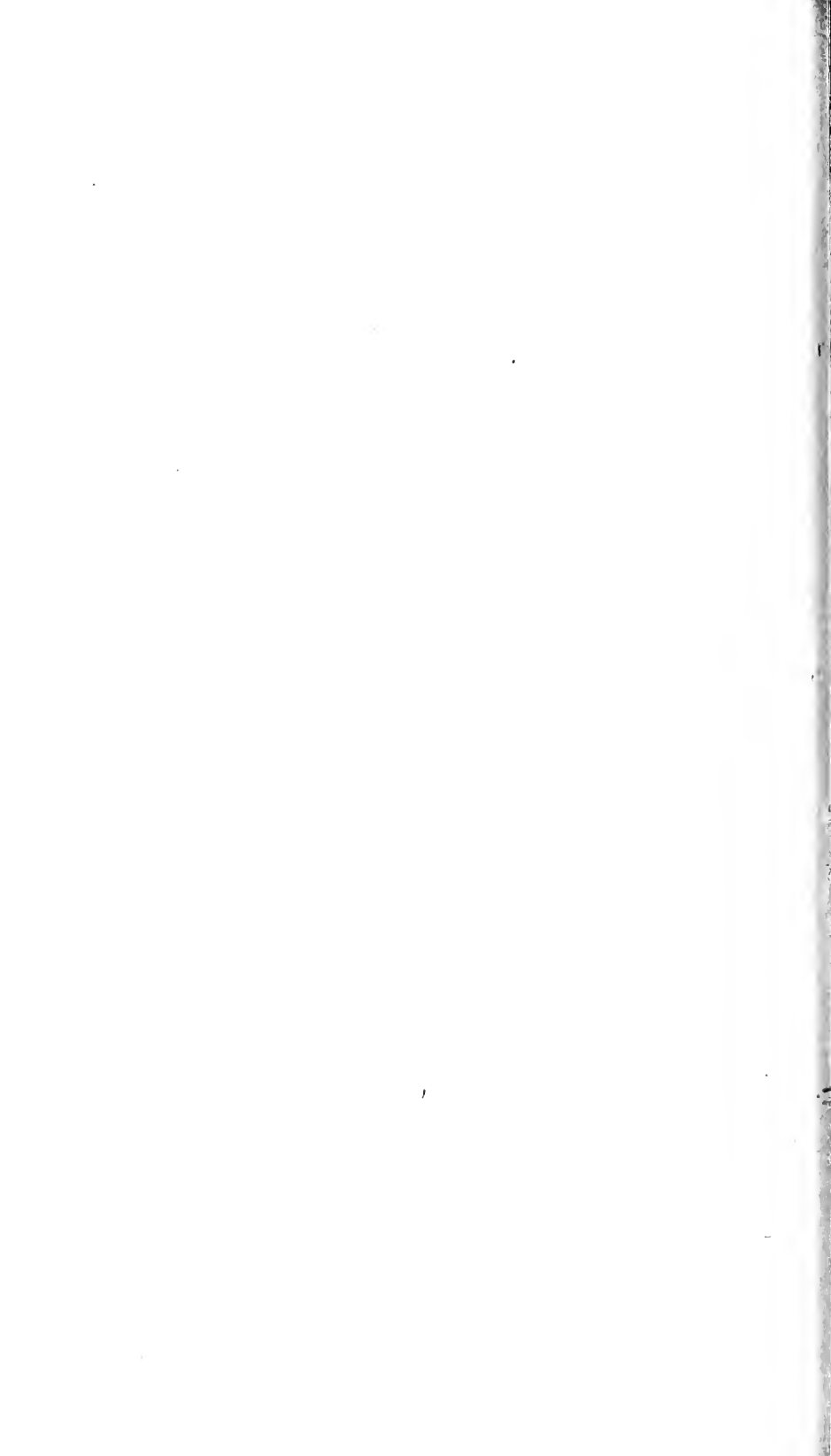
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Attorneys for Appellants.







APPENDIX.

No. 38.—October Term, 1954.

United States of America, Petitioner, v. Peter Brown.
(December 6, 1954.)

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Mr. Justice Douglas delivered the opinion of the Court.

This is a suit under the Federal Tort Claims Act, 28 U. S. C. §1346(b), brought by respondent, a discharged veteran, for damages for negligence in the treatment of his left knee in a Veterans Administration hospital. The injury to the knee occurred while respondent was on active duty in the Armed Services. The injury led to his honorable discharge in 1944. In 1950, the Veterans Administration performed an operation on the knee; but the knee continued to dislocate frequently. So another operation was performed by the Veterans Administration in 1951. It was during the latter operation that an allegedly defective tourniquet was used, as a result of which the nerves in respondent's leg were seriously and permanently injured.

The Veterans Act, 48 Stat. 526, 38 U. S. C. §501a, allows compensation both where the veteran suffers injury during hospitalization and where an existing injury is aggravated during the treatment. Each is considered as though it were "service connected." Respondent received a compensation award for his knee injury when he was honorably discharged; and that award was increased after the 1951 operation.

The District Court agreed with the contention of petitioner that respondent's sole relief was under the

Veterans Act and dismissed his complaint under the Tort Claims Act. The Court of Appeals reversed. 209 F. 2d 463. The case is here on a petition for certiorari which we granted because of doubts as to whether *Brooks v. United States*, 337 U. S. 49, or *Feres v. United States*, 340 U. S. 135, controlled this case.

The *Brooks* case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service. (337 U. S. 49, 52.) In that case, servicemen on leave were negligently injured on a public highway by a government employee driving a truck of the United States. The fact that compensation was sought and paid under the Veterans Act* was held not to bar recovery under the Tort Claims Act. We refused to “pronounce a doctrine of election of remedies, when Congress has not done so.” *Id.*, 53.

The *Feres* decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and the negligence alleged in each case was on the part of other members of the armed forces. The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it, holding that the Tort Claims Act does not cover “injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” (340 U. S. 135, 146.) The peculiar and special re-

*We indicated that recovery under the Tort Claims Act should be reduced by the amounts paid by the United States as disability payments under the Veterans Act. 337 U. S. 52, 53-54. See the case on remand, *United States v. Brooks*, 176 F. 2d 482, 484.

lationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. (*Id.*, 141-143.)

The present case is, in our view, governed by Brooks not by Feres. The injury for which suit was brought was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. The damages resulted from a defective tourniquet applied in a veteran's hospital. Respondent was there, of course, because he had been in the service and because he had received an injury in the service. And the causal relation of the injury to the service was sufficient to bring the claim under the Veterans Act. But, unlike the claims in the Feres case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act.

That Act provides that, "the United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances . . ." 28 U. S. C. §2674. The Feres case emphasized how sharp would be the break in tradition if the claims there asserted were allowed against the United States, the Court noting that the effect of the Tort Claims Act is "to waive immunity from recognized causes of action." "not to visit the Government with novel and unprecedented liabilities." 340 U. S. 135, 142. But that cannot be said here. Certainly this claim is one which might be cognizable

under local law, if the defendant were a private party. Responsibility of hospitals to patients for negligence may not be as notorious as the liability of the owners of automobiles. But the doctrine is not novel or without support. See, for example, *Sheehan v. North Country Community Hosp.*, 273 N. Y. 163, and the cases collected, in 25 A. L. R. 2d 29.

Congress could, of course, make the compensation system the exclusive remedy. The Court held in *Johansen v. United States*, 343 U. S. 427, that Congress had done so in the case of the Federal Employees Compensation Act with the result that a civilian employee could not sue the United States under the Public Vessels Act. We noted in the *Brooks* case, 337 U. S. 49, 53, that the usual workmen's compensation statute was in this respect different from those governing veterans, that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act. We adhere to that result. We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury in the present case was not incident to the military service, the *Brooks* case governs and the judgment must be

Affirmed.

Mr. Justice Black, with whom Mr. Justice Reed and Mr. Justice Minton join, dissenting.

In *Brooks v. United States*, 337 U. S. 49, we held that actions for damages could be brought against the Government for injuries to one soldier and the death of another due to negligent operation of an army truck. But we pointed out that the accident there had nothing to do with the "army careers" of the soldiers and was neither caused by nor incident to their military service. When injured the two soldiers were off duty and were riding along a state highway in their own car on their own business which bore no relationship of any kind to any past, present or future connection with the army. Thus, the two soldiers would have been injured had they never worn a uniform at all. In this case, however, the injury is inseparably related to military service and the Brooks case should not be held controlling. But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury.

For a hospital injury a veteran is entitled to precisely the same disability benefits as if the injury had been inflicted while he was a soldier.* We have previously

*"Where any veteran suffers . . . an injury or an aggravation of any existing injury, as the result of hospitalization or medical or surgical treatment . . . benefits . . . shall be awarded in the same manner as if such disability, aggravation or death were service connected. . . ." 48 Stat. 526, 38 U. S. C. §501a.

held, I think correctly, that a soldier injured in a hospital cannot also sue for damages under the Tort Claims Act. *Feres v. United States*, 340 U. S. 135. But the Court now holds that a veteran can. To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.

No. 13889

**In the United States Court of Appeals
for the Ninth Circuit**

PREFERRED INSURANCE COMPANY, A CORPORATION ; MICHIGAN SURETY COMPANY, A CORPORATION ; MID-STATES INSURANCE COMPANY, A CORPORATION ; AND THE MERCANTILE INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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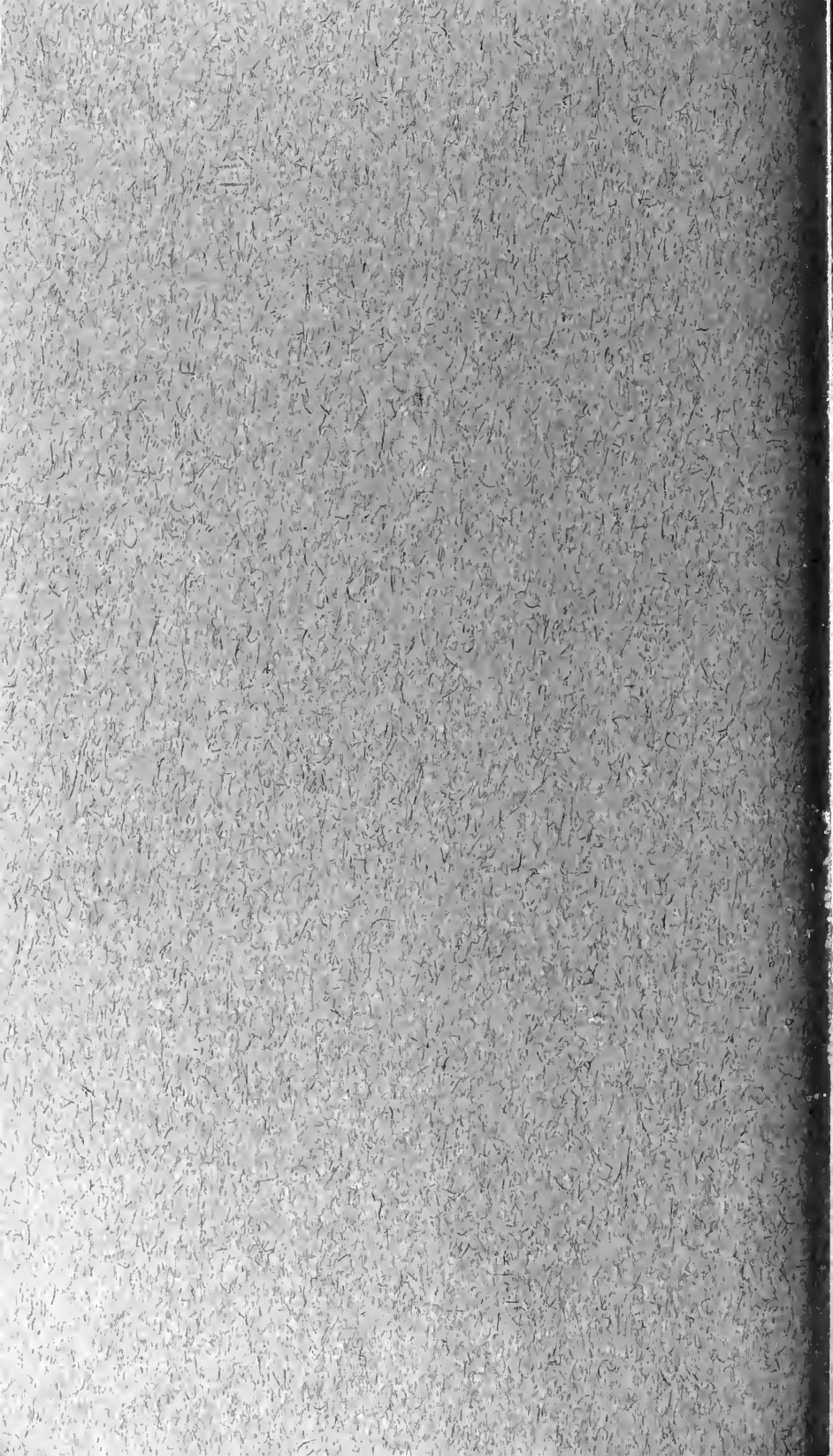
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 13889

PREFERRED INSURANCE COMPANY, A CORPORATION; MICHIGAN SURETY COMPANY, A CORPORATION; MID-STATES INSURANCE COMPANY, A CORPORATION; AND THE MERCANTILE INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANTS,

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

JURISDICTION

The jurisdiction of the District Court was invoked under the Federal Tort Claims Act¹ (R. 3). Its opinion is reported at 111 F. Supp. 899 (R. 22-37), *sub nom. Fidelity-Phenix Fire Insurance Company v. United States*.

¹The Act of June 25, 1948, while repealing the Federal Tort Claims Act, reenacted all of its provisions into the codification of Title 28, effective September 1, 1948 (62 Stat. 683, 862). The Tort Claims Act's basic provisions are now contained in 28 U.S.C. 1346(b) and 2671-2680.

The Court's jurisdiction rests on 28 U. S. C. 1291 by reason of notice of appeal filed June 19, 1953, from a judgment in favor of the United States entered on June 16, 1953 (R. 39).

STATEMENT

This is an appeal from a judgment dismissing a complaint by the appellant insurers against the United States under the Federal Tort Claims Act, seeking reimbursement for the proceeds of property damage policies paid to certain insured servicemen whose house trailers had been damaged by the crash of an Air Force plane.

On August 5, 1950, at approximately 10 p. m., an Air Force B-29 crashed at the Fairfield-Suisun Air Force Base in California a few seconds after its take-off from that Base (R. 19). The point of impact was near the Base's Trailer Park, containing 48 trailers owned and occupied by servicemen assigned to the base and their dependents (R. 13, 20). The trailers and household and personal belongings contained therein suffered considerable damage. Appellant insurers, whose claims are involved on the instant appeal, in accord with the terms of insurance policies issued to the trailer owners, paid them a total of \$49,661 for damage to 17 trailers (R. 5-6).² Administrative claims for damage to the property belonging to the military personnel were also filed with the Air Force under the Military Personnel Claims Act and were "paid except for that property covered by

² Other insurance companies paid for the damage to the remaining trailers. Their claims, similar to those asserted by the insurers on the instant appeal, were also dismissed by the court below and are before this Court in *Fidelity-Phenix Fire Insurance Co. v. United States*, No. 14001; *Albert G. Whipple v. United States*, No. 14002; *George Stropck v. United States*, No. 14003; *Government Employees Insurance Company v. United States*, No. 14004; and *St. Louis Fire & Marine Insurance Company v. United States*, No. 14005.

insurance, as provided by regulations under such statute" (R. 15).

The insurers' complaint, filed under the Federal Tort Claims Act on November 5, 1951, alleged that the crash resulted from negligent maintenance and operation of the Air Force plane (R. 5). The complaint further asserted that, by payment of the \$49,661 under the policies to the servicemen, the insurers had become "subrogated to the rights of their respective insureds" against the United States to that extent (R. 6).

The United States moved to dismiss on the ground of lack of jurisdiction (R. 10). In a supporting affidavit the Government showed that the insurers' subrogation claims were for property losses of "military personnel in the United States Air Force stationed at [Fairfield-Suisun] Base in the discharge of military functions, and that all of these men were on active duty, and duly assigned to military functions, at and about the time of the said crash" (R. 11). The affidavit also showed that all of the property in question "was located on and within the said Base in an area duly assigned by competent military authority as an area for trailers in which the men slept between hours of work and that the area was under military protection." (R. 11).

The following facts with respect to the operation of the Base Trailer Park were stipulated (R. 13):

The detailed procedures controlling the operation and maintenance of the Trailer Park within the confines of the Fairfield-Suisun Air Force Base were prescribed in a Base regulation (R. 13).³ Only "Air Force personnel

³ For the convenience of the Court, the full text of this Base Regulation No. 30-2, issued by Brigadier General Travis on April 24, 1950, is set forth in the Appendix, *infra*, p. 26.

and their families who are assigned to" the Base were allowed to use the Trailer Park facilities (R. 13; par. 4b, Base Reg. 30-2, *infra*, p. 26). Specific assignments and termination of trailer space were made by the Base billeting officer (R. 13; par. 6a, Base Reg. 30-2, *infra*, p. 27). Assignment of trailer park space automatically terminated "when the Base ceases to be the permanent station of the individual concerned" (par. 6c(1), Base Reg. 30-2, *infra*, p. 27).

The Trailer Park was operated as a non-profit activity, with the occupants charged a monthly fee determined by the Base billeting officer and by a council appointed by the Base Commanding Officer from the members of the Trailer Park (R. 13; pars. 3b, 5a, 7, Base Reg. 30-2, *infra*, pp. 26-27. All "repairs and removal of government property [could] be made by Air Installation personnel only" (R. 14; par. 10a, Base Reg. 30-2, *infra*, p. 28). Like the rest of the Air Force Base, the Trailer Park area was under military protection and subject to the jurisdiction of military police (R. 11, 14). Military personnel in the park area could leave the Trailer Park subject to the same restrictions as other personnel stationed elsewhere on the Base (R. 14).

While the military personnel living at the Base Trailer Park were not required to live on the Base, "the surrounding area was a critical housing area" (R. 15). The Trailer Park accordingly had been set aside within the Base for use by the military personnel as a "convenience and accommodation of such personnel, [and] for the mutual benefit of the personnel and the Air Force" (R. 16). The trailers damaged in the August 5, 1950, plane crash had been "permanently placed in their positions by means of jacks or other

means for the duration of the serviceman's assignment or until assigned to other permanent duty" (R. 17).

The court below, upon consideration of the foregoing facts, ruled that the property damage sustained by the Air Force personnel was incident to their service, that their exclusive remedy was under the Military Personnel Claims Act, and that neither they nor their insurers could maintain suit for that damage under the Federal Tort Claims Act (R. 22-37). The Government's motion to dismiss was accordingly granted and the subrogation claims dismissed (R. 38).

QUESTION PRESENTED

Whether the Military Personnel Claims Act, which expressly covers "any claim against the United States * * * of military personnel * * * for damage to * * * personal property occurring incident to their service," constitutes the exclusive remedy for such property damages and therefore precludes insurers' subrogation claims under the Federal Tort Claims Act for such damages.

STATUTES INVOLVED

1. Section 1346(b) of Title 28 U. S. C. (part of the Federal Tort Claims Act)⁴ provides:

Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court of the Virgin Islands shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any

⁴ See footnote 1, p. 1.

employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Military Personnel Claims Act of 1945 provides in pertinent part (59 Stat. 225):⁵

SEC. 1. The Secretary of War, and such other officer or officers as he may designate for such purposes and under such regulations as he may prescribe, are hereby authorized to consider, ascertain, adjust, determine, settle, and pay any claim against the United States, including claims not heretofore satisfied arising on or after December 7, 1939, of military personnel and civilian employees of the War Department or of the Army, when such claim is substantiated, and the property determined to be reasonable, useful, necessary, or proper under the attendant circumstances, in such manner as the Secretary of War may by regulation prescribe, for damage to or loss, destruction, capture, or aban-

⁵ The Military Personnel Claims Act was amended, subsequent to the crash which gave rise to the claims involved in the instant case, on July 3, 1952 (66 Stat. 321) and on August 1, 1953 (67 Stat. 317). The first amendment expressly extended the Act to Air Force personnel claims. The 1953 amendment enlarged the time for filing of certain claims.

At the time of the crash involved here and before the 1952 amendment making the Military Personnel Claims Act expressly applicable to claims by Air Force personnel, the functions of the War Department with respect to Air Force personnel claims under the Military Personnel Claims Act had been transferred to the Secretary of the Air Force by the National Security Act of 1947 (61 Stat. 495, 501, 503; 5 U.S.C. 626). That Act changed the title of the Secretary of War to Secretary of the Army and created the Department of the Air Force and its head, the Secretary of the Air Force. It also provided for the transfer of appropriate functions from the Secretary of the Army to the Secretary of the Air Force (61 Stat. 503).

donment of personal property occurring incident to their service, or to replace such personal property in kind: *Provided*, That the damage to or loss, destruction, capture, or abandonment of property shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee, and shall not have occurred at quarters occupied by the claimant within continental United States (excluding Alaska) which are not assigned to him or otherwise provided in kind by the Government. No claim shall be settled under this Act unless presented in writing within one year after the accident or incident out of which such claim arises shall have occurred: *Provided*, That if such accident or incident occurs in time of war, or if war intervenes within two years after its occurrence, any claim may, on good cause shown, be presented within one year after peace is established. Any such settlement made by the Secretary of War, or his designee, under the authority of this Act and such regulations as he may prescribe hereunder, shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary.

SEC. 2. Such appropriations as may be required for the settlement of claims under the provisions of the Act of March 3, 1885 (23 Stat. 350), as amended, shall be available for the settlement of claims under the provisions of this Act.

SEC. 3. Sections 3483-3488 of the Revised Statutes (31 U.S.C. 209-214), and the Act of March 3, 1885 (23 Stat. 350), as amended by the Act of July 9, 1918 (40 Stat. 880), and by the Act of March 4, 1921 (41 Stat. 1436; 31 U.S.C. 218-222), and by section 6 of the Act of July 3, 1943 (57 Stat. 374; 31 U.S.C. 222a, 222b), are hereby repealed.

ARGUMENT

For nearly a century before the Federal Tort Claims Act became law in 1946, Congress, through a long series of enactments, had provided a detailed and comprehensive system of administrative compensation for property damage or loss sustained by military personnel incident to their service. Congressional reexamination of these numerous statutes disclosed the need for coordinating their various provisions and resulted in the Military Personnel Claims Act of 1945. In Point I we show that this 1945 Act is the exclusive remedy for damage or loss of property of a member of the Armed Forces incident to his service and thus precludes his recovery of damages under the Federal Tort Claims Act.

We further show in Point II that the exclusiveness of this Military Personnel Claims Act remedy bars suit under the Federal Tort Claims Act not only by the serviceman, but under settled principles of subrogation, by his insurer.

I

The Military Personnel Claims Act Remedy Precludes an Action by a Member of the Armed Forces under the Federal Tort Claims Act for Property Damage Incident to His Service

Almost one hundred years before the enactment of the Federal Tort Claims Act in 1946, Congress had established a system for compensating servicemen for personal property damage incident to their service. As early as 1849, Congress made express provision for payment by the Government of various types of property damage incident to the claimant's military service. Act of March 3, 1849, 9 Stat. 415. This statute was the first in a long series of many Congressional enactments, developing an administrative settlement system for such property damage claims. See, *e.g.*, Act of March 3,

1863, 12 Stat. 743; Act of March 3, 1885, 23 Stat. 350; Act of July 9, 1918, 40 Stat. 880; Act of March 4, 1921, 41 Stat. 1436; Act of July 3, 1943, 57 Stat. 374.

In 1945, Congress reexamined these numerous statutes under which a detailed settlement system had developed. The need for consolidation and coordination of the various statutory provisions authorizing administrative payment of incident-to-service property damage claims was apparent. H.R. 2068, later enacted as the Military Personnel Claims Act of 1945, was accordingly introduced at the first session of the 79th Congress. 91 Cong. Rec. 975. Both the House and Senate Committees on Claims, reporting H.R. 2068 out favorably, stated:

The purpose of the proposed legislation is to provide a single, clear, definite, and workable statute for the settlement of claims of military personnel and civilian employees of the War Department or of the Army for the loss of their personal property incurred while in the service and to repeal certain statutes which have been found to be obsolete or unworkable and not appropriate to present conditions. (H. Rept. 237, 79th Cong., 1st sess., p. 1; S. Rept. 276, 79th Cong., 1st sess., p. 2; see 91 Cong. Rec. 1540, 3990, 4690.)

Within two weeks after being reported out by the Senate Committee, this proposed "single, clear, definite, and workable statute" for the settlement of service-incident property damage claims became law as the Military Personnel Claims Act of 1945.⁶ 91 Cong. Rec. 4804, 5445.

⁶ This 1945 Act, as noted by the court below (R. 28), completed the original plan for consolidation into three separate statutes of all of the statutory settlement provisions affecting the Armed Forces.

A. The Remedy under the Military Personnel Claims Act Is Exclusive for All Service-Incident Property Damage Claims

It is familiar law that where Congress, over a long period of time and through a series of enactments has

H. Rept. 237, 79th Cong., 1st sess., p. 3; S. Rept. 276, 79th Cong., 1st sess., p. 3. The first two statutes, the Foreign Claims Act (57 Stat. 666) and the Military Claims Act (57 Stat. 374), were enacted in 1943. In referring to these two statutes and the need for enacting H.R. 2068 as the third and final statute, Secretary of War Patterson pointed out (H. Rept. 237, 79th Cong., 1st sess., p. 4):

By the passage of the act of April 22, 1943 (57 Stat. 66), commonly referred to as the Foreign Claims Act, the Congress made available to the War Department a thoroughly satisfactory and workable basis for the settlement of claims for damage caused by our armed forces in foreign countries.

The next forward step came with the passage of the act of July 3, 1943, which consolidated all then existing statutory provisions for the administrative settlement of claims other than claims under the Foreign Claims Act and claims of War Department and Army personnel.

The only field of statutory authorization with respect to military claims which has not been modernized to meet present conditions is that covering the claims of military personnel and civilian employees of the War Department or of the Army for damage to or loss, destruction, capture, or abandonment of personal property occurring incident to their service. Fair, just, and prompt administrative processing of these claims is of paramount importance, especially in time of war. The manner in which such claims are handled and the length of time required to effect payment or other final action has a direct effect upon morale in the Army and upon relatives and friends on the home front. At the present time, members of our armed forces and civilian employees of the War Department or of the Army stationed in all parts of the world are continuously subjected to hazards which result in loss, damage, or destruction of their personal property. It has become apparent that there is urgent need for new legislation to effect a fair, equitable, and uniform basis for the settlement of such claims.

Enactment of the enclosed bill would make possible the settlement by disapproval, replacement in kind, or payment in money, of claims for damage to or loss, destruction, capture, or abandonment of personal property coming within the provisions thereof to be effected, after appropriate investigation and recommendation, by the Secretary of War, with power to delegate such authority in appropriate classes of cases and under applicable Army regulations.

legislated with respect to a particular subject matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application, which would otherwise apply, are held to be inapplicable to the special subject matter. *United States v. Barnes*, 222 U.S. 513, 520 (1912); *United States v. Sweet*, 245 U.S. 563 (1918); *Ozawa v. United States*, 260 U.S. 178, 193, 194 (1922); *United States v. Jefferson Electric Co.*, 291 U.S. 386, 396 (1934); *Missouri v. Amer. Trucking Ass'ns*, 310 U.S. 534, 544 (1940).

It is equally settled that the foregoing rule is fully applicable in determining whether the Federal Tort Claims Act, concededly a statute of general application, is to be construed so as to authorize recovery of damages on claims already covered by a detailed and statutory compensation system. In *Feres v. United States*, 340 U.S. 135, 140 (1950), the Supreme Court held the Tort Claims Act inapplicable to claims by servicemen for service-incident injuries because a "comprehensive system of relief had [theretofore] been authorized for them and their dependents by [prior] statute." Justice Jackson, speaking for a unanimous court, pointed out that

The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. [340 U. S. 135, 140.]

Showing that that purpose would in no way be served by affording servicemen alternative damages under the Tort Claims Act, the opinion emphasizes the "bearing upon it [of] enactments by Congress which provide

systems of simple, certain, and uniform compensation.”
340 U. S. 135, 144.

That the existence of a clear and definite compensation system was the *ratio decidendi* of the *Feres* exclusion from the Federal Tort Claims Act of servicemen's claims is made even more apparent by the later Supreme Court decisions interpreting and applying the *Feres* case. In *Johansen v. United States*, 343 U. S. 427 (1952), the Supreme Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries for which damages were sought there was no express declaration in the Federal Employees Compensation Act that the remedies thereunder were exclusive. Relying on *Feres* and as if to eliminate all doubt that the Supreme Court viewed its *Feres* holding as being based on the “exclusive character” of the compensation system, the *Johansen* opinion states (343 U. S. 527, 440, 441):

* * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres v. United States*, 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as “to make a workable, consistent and equitable whole,” p. 139, we gave weight to the character of the federal “systems of simple, certain, and uniform compensation for injuries or death of those in armed services.” p. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.

* * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to

that system without specific legislation to that effect.

Shortly thereafter, in *Dalehite v. United States*, 346 U. S. 15 (1953), the Court again reiterated the basis for its decision in the *Feres* case by pointing out that it was "the existence of the uniform compensation system" which "led us [in the *Feres* case] to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law." 346 U. S. 15, 31, note 25.

The courts of appeals have also applied the *Feres* case in holding that the existence of a clear and definite scheme of special statutory compensation precludes resort to a tort action against the United States. Thus, in *Lewis v. United States*, 190 F. 2d 22 (1951), certiorari denied, 342 U. S. 869, the District of Columbia Court of Appeals held that a U. S. Park policeman whose compensation statute, like that of the employees in *Johansen* and the servicemen in *Feres*, contained no express declaration of exclusiveness, was nevertheless barred by virtue of the compensation statute from maintaining a Tort Claims Act suit against the United States. After quoting the Supreme Court's language in *Feres* as to the importance of "enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services," the court of appeals observed (190 F. 2d 22, 23):

By parity of reasoning we think the same result must be reached in this case. Like the soldier in the *Feres* case, the Park Policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment en-

titled "to all the benefits of relief and retirement" furnished by the "Policemen's and Firemen's Relief Fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, retirement. * * *" As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other." 340 U. S. 135, 144. * * *

Similarly, in *O'Neil v. United States*, 202 F. 2d 366 (C. A. D. C.) (1953), the court, holding that the claimants' eligibility for compensation benefits precluded a Tort Claims Act suit, stated (202 F. 2d 366, 367):

* * * we think the basic principle of the [*Feres*] case covers this appeal. In *Johansen v. United States*, 343 U. S. 427, 439, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres v. United States* * * *."

This Court's recent decision in *United States v. Firth*, 207 F. 2d 665 (1953) takes the identical view. In directing the dismissal of a wrongful death action filed against the United States under the Public Vessels Act, this Court, relying on the *Johansen* case, which as we have shown was itself based on the *Feres* principle of the exclusive character of the compensation remedy, pointed out that the decedent's heirs must look to the Federal Employees Compensation Act for relief. And the Seventh Circuit Court of Appeals, in directing that a Tort Claims Act complaint against the United States

be dismissed and that the claimant be remitted to his compensation remedy, also pointed out that *Johansen*, resting on the *Feres* principle of exclusiveness of the compensation remedy, "is decisive of the question of exclusiveness of remedy afforded by the Federal Employees Compensation Act." *Sasse v. United States*, 201 F. 2d 871, 873 (1953).⁷

The uniform holdings of the cited cases show that where the Government has set up a statutory system allowing administration disposition of claims, that remedy is exclusive.⁸ Since the Military Personnel Claims Act applies to service-incident property damage claims, we submit that the rule applied by the Supreme Court in the *Feres* and *Johansen* cases requires affirmance of the lower court's dismissal of the instant Tort Claims Act suit if the instant property damage claims were incident to the military service of the trailer owners. To that question we now turn.

B. *The Property Damage Claims Involved Here Were Service-Incident in Nature*

The Military Personnel Claims Act of 1945 authorizes payment of claims only where the loss or damage of personal property belonging to members of the armed

⁷ Identical considerations have compelled other courts considering various other types of legislation permitting suit against the United States to hold that the administrative compensation remedy precludes alternative relief under the statute authorizing suit. *Dobson v. United States*, 27 F. 2d 807 (C.A. 2) (1928), certiorari denied, 278 U.S. 653; *Bradey v. United States*, 151 F. 2d 742 (C.A. 2) (1945), certiorari denied, 326 U.S. 795.

⁸ This exclusiveness, despite appellants' suggestion to the contrary, is not dependent on the claimant's individual eligibility for an administrative recovery. The *Feres* and *Johansen* principle of exclusiveness of the compensation plan applies in all cases where the claim falls within the class generally cognizable under the administrative scheme, even though the claimant, for special circumstances, may be denied administrative compensation in a particular case. *Underwood v. United States*, 207 F. 2d 862 (C.A. 10) (1953).

forces "occurr[ed] incident to their service." Section 1, *supra*, p. 7. The record shows that claims for loss of property in the crash involved in the instant case were "submitted under the Military Personnel Claims Act of 1945 (31 U. S. C. 222c)" and paid by the Air Force in accord with the provisions of that Act (R. 15, 18, 20). These payments by the Air Force were necessarily predicated on an administrative determination that the damages paid for by the Government occurred incident to the claimants' military service. And such a determination is, by the express language of Section 1 of the Military Personnel Claims Act, "final and conclusive for all purposes, notwithstanding any other provision of law to the contrary."⁹ Section 1, *supra*, p. 7.

The Air Force determinations that (1) the claims involved were incident to the service of the military personnel whose property was destroyed in the crash and (2) that the claims fall under the exclusive remedy provision of the Military Personnel Claims Act are therefore binding and not subject to judicial review. Cf. *United States v. Babcock*, 250 U. S. 328, 331 (1919); *Dismuke v. United States*, 297 U. S. 167, 171 (1936); *Stark v. Wickard*, 321 U. S. 288, 306 (1944). But even if the "incident-to-service issue" were open to decision *res nova*, there would be no doubt as to the correctness of the Air Force ruling on the question.

⁹ It is significant that an identical provision, according finality and conclusiveness to Air Force determinations under the Military Personnel Claims Act, was re-incorporated in Section 1(c) of the 1952 revision of that Act. 66 Stat. 321, 323.

This binding administrative determination that the claims here involved were service-incident distinguishes the instant case from *Lund v. United States*, 104 F. Supp. 756 (D. Mass. 1950), where no such determination was made. Nor is the *Lund* case supported by the various JAG opinions cited by appellants. Obviously the "service-incident" issue is largely a factual one, and the JAG opinions turn on the facts peculiar to them.

Appellants recognize that the property damage claims in this case must be considered as having been "incident to [military] service" if they "arose out of or in the course of activity incident to the service of the [military] personnel concerned." Appellants' Brief, p. 57. The language "arising out of or in the course of activity incident to the service" paraphrases the established concept of "arising out of and in the course of employment" in workmen's compensation law. And the Supreme Court's use in *Feres v. United States* of the terms "incident to service" and "arising out of or in the course of activity or duty" interchangeably and its likening of the military benefits to workmen's compensation benefits throughout the opinion (340 U. S. 135, 138, 143, 144, 145, 146) confirm the need for defining "incident to service" in the same manner as "arising out of and in the course of employment" is understood and applied in the field of workmen's compensation.

Less than three months after indicating in *Feres* that "incident to service" means "course of employment" as defined for workmen's compensation purposes, the Supreme Court reiterated the settled principles underlying that definition. In *O'Leary v. Brown-Pacific-Maxon*, 340 U. S. 504, 506-507 (1951), the Court, holding that the death of the employee in that case occurred within the course of his employment despite the fact that he was then on leave and not actively on duty or directly advancing his employers' interests, stated:

The Longshoremen's and Harbor Workers' Act authorizes payment of compensation for "accidental injury or death arising out of and in the course of employment." § 2 (2), 44 Stat. 1425, 33 U. S. C. § 902(2). * * * Workmen's compensation is not con-

fined by common-law conceptions of scope of employment. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U. S. 469, 481; *Matter of Waters v. Taylor Co.*, 218 N. Y. 248, 251, 112 N. E. 727, 728. *The test of recovery is not a causal relation between the nature of employment of the injured person and the accident. Tom v. Sinclair (1947) A. C. 127, 142. Nor is it necessary that the employee be engaged at the time of the injury in activity of benefit to his employer. All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose. * * * (Emphasis supplied.)*

In other words, "The basic thing" is that an incident of his employment places the claimant in a position where he is surrounded with conditions giving rise to the claim. *Hartford Accident & Indemnity Co. v. Cardillo*, 112 F. 2d 11, 14 (C. A. D. C.) (per Mr. Justice Rutledge) (1940), certiorari denied, 310 U. S. 649; see also *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711 (per Mr. Justice Cardozo) (1920).

That their military employment placed the service personnel in the "zone of special danger" and surrounded them with the conditions giving rise to the instant claims cannot seriously be challenged. It was only because the servicemen, whose trailers were destroyed, were members of the Air Force assigned to the Fairfield-Suisun Air Force Base that they were allowed to make use of the Trailer Park facilities at that Base. *Supra*, p. 3. Obviously, use of these facilities, in view of the regularly heavy air traffic at any Air Force Base, surrounded the servicemen with the precise conditions out of which the instant claims arose. Since it was the servicemen's military status which placed

them in the "zone of special danger," the instant claims must be viewed as having arisen out of or in the course of their military employment and incident to their service.

It is true, as appellants point out, that the military personnel were not compelled or directed to live in the Base Trailer Park. But, as appellants also note, "the surrounding area was a critical housing area." Appellants' Brief, p. 3; R. 15. Other trailer park accommodations were obviously not available within a reasonable distance. In similar situations arising under the workmen's compensation laws, it has been held that the claims arose as an "incident" to the claimants' employment, despite the fact that they were not ordered or required to live on the employers' premises. *Allen v. D. D. Skousen Const. Co.*, 55 N. Mex. 1, 225 P. 2d 452 (1950); *Wilson Cypress Co. v. Miller*, 157 Fla. 459, 26 S. 2d 441 (1946). Thus, even apart from the binding effect of the Air Force determination that the instant claims are "service-incident," the uniform holdings of the cited cases eliminate any doubt that these claims "arose out of or in the course of" military activity and "incident to the service" of the Air Force personnel involved.

II

Since Subrogation Is a Derivative Right, a Serviceman's Insurer Cannot Maintain an Action under the Federal Tort Claims Act for Property Damage Incident to the Insured's Service

In Point I we have shown that the instant claims are for property damages occurring incident to the military service of the Air Force personnel who owned the trailers, that their exclusive remedy is the Military Person-

nel Claims Act,¹⁰ and that any action by the servicemen under the Federal Tort Claims Act would therefore be barred. We show now that the instant subrogation actions by the appellant insurers are likewise barred.

The doctrine that "One who rests on subrogation stands in the place of one whose claim he has paid" is fundamental in our law. *United States v. Munsey Trust Co.*, 332 U. S. 234, 242 (1947). Subrogation is a derivative right and invests the insurer with only those rights the insured has against the defendant. *Phoenix Insurance Co. v. Erie Transportation Co.*, 117 U. S. 312 (1886); *Wager v. Providence Insurance Company*, 150 U. S. 99, 108 (1893); *Standard Marine Ins. Co. v. Assur. Co.*, 283 U. S. 284, 286 (1931).

It is for that reason that where the insured cannot bring suit against the United States, suit by his insurer is also prohibited.¹¹ This identical issue has been decided by the Court of Appeals for the Second Circuit in

¹⁰ Appellants argue that the Army and Air Force have not viewed the Military Personnel Claims Act as exclusive, but have allowed military claimants the right to elect to proceed under either that Act or the Military Claims Act (57 Stat. 372, as amended). Appellants' Brief, pp. 12, 17. The short answer to this argument is that the official Regulations promulgated by the Army and Air Force recognize the exclusive nature of the Military Personnel Claims Act remedy. Thus, the Army regulations expressly state that, wherever applicable, its regulations under the Military Personnel Claims Act "are used to the exclusion of all other regulations" issued by the Army under the Military Claims Act or any other act. 32 C.F.R. 536.3. Similarly, the Air Force regulations provide that its regulations under the Military Personnel Claims Act are "preemptive of other claims regulations" of the Air Force. 32 C.F.R. 836.103.

¹¹ *United States v. Aetna Surety Co.*, 338 U.S. 366 (1949), in no way authorizes a subrogation claim under the Federal Tort Claims Act where the insured is barred from maintaining such a suit. To the contrary, that opinion fully recognizes that an insurer may sue under the Tort Claims Act only "upon a claim to which it has become subrogated by payment to an insured who would have been able to bring such an action." (Emphasis supplied.) 338 U.S. 366, 368.

a situation where the insurer claimed subrogation rights through Defense Supplies Corporation against the United States. *Defense Supplies Corporation v. United States Lines Co.*, 148 F. 2d 311 (1945). There, in affirming a dismissal of a suit on behalf of the insurer against the United States on the ground that Defense Supplies Corporation itself could not maintain such a suit, the court of appeals ruled (148 F. 2d 311, 312):

The threshold question is whether the Defense Supplies Corporation may bring suit against the United States under the Suits in Admiralty Act. We recognize the fact that the real parties in interest are the insurance companies. But their right to sue is dependent upon the right of the party to whom they are subrogated.

* * * * *

It seems clear to us that the complete ownership of the Defense Supplies Corporation by the United States shows this to be nothing more than an action by the United States against the United States. The Act would appear to contemplate no such action. Sections 1 and 2 indicate that the United States shall be the defendant. And Section 3 states that such suits as are brought under the Act shall proceed according to the principles of law and rules of practice obtaining in like cases between private parties. In private litigation the plaintiff and defendant cannot be the same. For, in that event, there is no real case or controversy. We conclude, therefore, that the Defense Supplies Corporation cannot maintain a suit against the United States under the Suits in Admiralty Act.

Accord: *Defense Supplies Corporation v. American-Hawaiian S. S. Corp.*, 64 F. Supp. 459, 470 (S.D. N.Y.)

(1945). In the latter cases, Defense Supplies Corporation's lack of capacity to sue the United States precluded its insurer from maintaining such a suit. In the instant case, since the exclusiveness of the Military Personnel Claims Act remedy bars the servicemen whose trailers were destroyed from maintaining Federal Tort Claim Act suits against the United States, it similarly follows that appellant insurers' subrogation claims under that Act must also fail.

No departure from these settled subrogation principles is warranted because the Military Personnel Claims Act, which authorizes payment of claims of "military personnel," has been interpreted to be limited to claims filed by servicemen on their own behalf and to exclude from its coverage "losses of insurers and other subrogees" and "losses * * * recovered or recoverable from an insurer." 32 C.F.R. 836.93(i) and (j).¹² The limitation in these regulations obviously means that the United States agrees to make payment under the Military Personnel Claims Act to servicemen only on con-

¹² The legislative history of the 1952 amendment to the Military Personnel Claims Act of 1945 demonstrates full Congressional awareness and approval of the administrative interpretation barring insurers from the benefits of the Military Personnel Claims Act. This interpretation was placed squarely before Congress when H.R. 404, 82d Cong., 2d sess., later enacted as the 1952 amendment was being considered. A copy of the administrative regulations setting forth this administrative interpretation of the Military Personnel Act appears in full in S. Rept. 1691, 82d Cong., 2d sess., p. 3, and specifically includes among the "claims not payable":

i. Losses of subrogees.—Losses of insurers and other subrogees.

j. Losses recoverable from insurer.—Losses, or any portion thereof, which have been recovered or are recoverable from an insurer.

Notwithstanding the fact that its attention was specifically directed to the administrative ban against payment of claims to

dition that the United States is to have the full benefit of any insurance effected on the property by servicemen with their private insurers. Far from supporting appellants' claims here, the presence of this condition constitutes an additional and independent basis for the insurers' inability to maintain the present Tort Claims Act suit against the United States.

Ever since *Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U.S. 312 (1886), it has been recognized that such a condition is fully effective as against the insurer. In that case, a shipper's goods were destroyed in transit. A condition in the bill of lading provided that the carrier was to have the full benefit of any insurance effected upon the goods by the shipper with any insurer. The insurer, after paying the shipper the loss under the policy, claimed to be subrogated to the shipper's rights against the carrier. In sustaining, as against the insurer, the validity of the condition in the bill of lading, the Supreme Court observed (117 U.S. 312, 321) :

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful

insurers, Congress in no way modified that limitation. Instead, the 1952 amendment eliminated an entirely unrelated limitation concerning property damage claims on behalf of servicemen who died prior to the property damage loss. Apart from all other considerations, Congressional enactment of H.R. 404 into the 1952 amendment with full awareness that insurers' claims had regularly been rejected administratively but without any modification of that administrative interpretation, constitutes, we submit, an acceptance and ratification by Congress of the administrative interpretation barring insurance claims under the Military Personnel Claims Act. See *Fleming v. Mohawk Co.*, 331 U.S. 111 (1947); *Brooks v. Dewar*, 313 U.S. 354 (1941).

contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

In the same case the Court further noted (117 U.S. 312, 325):

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

All other cases are in accord in holding that an insurer's claim to subrogation rights cannot be recognized where the carrier has contracted with the owner that the carrier shall have the benefit of any insurance effected by the owner. *Great Lakes Corp. v. S. S. Co.*, 301 U.S. 646, 654 (1937); *National Garment Co. v. New York, C. & St. L. R. Co.*, 173 F. 2d 32, 37 (C.A. 8) (1949); see 18 Comp. Gen. 203 (1938). We submit that the reasoning of the cited authorities is applicable here and fully warrants the conclusion that the condition in the Military Personnel Claims Act regulations giving the United States the benefit of insurance taken out by servicemen, prevents recognition of appellant insurers' subrogation claims.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

WARREN E. BURGER,
Assistant Attorney General.

LLOYD H. BURKE,
United States Attorney.

PAUL A. SWEENEY,
MORTON HOLLANDER,
Attorneys, Department of Justice.

APPENDIX

HEADQUARTERS
 9TH BOMBARDMENT WING, HEAVY
 FAIRFIELD-SUISUN AIR FORCE BASE
 Fairfield, California

BASE REGULATION)
 NUMBER 30-2)

PERSONNEL

FAIRFIELD-SUISUN TRAILER PARK

(This regulation supersedes Base Regulation 85-8,
 11 October 1949)

1. PURPOSE: The purpose of this regulation is to provide for the operation and maintenance of a trailer park at this station.

2. SCOPE: This regulation is applicable to all occupants of the Base Trailer Court and personnel connected with the court in a supervisory or administrative capacity.

3. GENERAL: The Fairfield-Suisun Trailer Park will be operated as a non-profit activity at minimum expense to the Government.

4. LOCATION AND USE OF THE TRAILER PARK:

a. The Fairfield-Suisun Trailer Park will be located in the area South of Fairfield Avenue opposite the T-700 Block.

b. The Trailer Park facilities will be for the use of Air Force Personnel and their families who are assigned to this station and who own and occupy their own factory-built or equivalent trailer home and are assigned trailer space at the park.

5. ADMINISTRATION OF THE TRAILER PARK AND THE TRAILER PARK ASSOCIATION FUND:

a. The Trailer Park fund will be operated and administered by the Base Billeting Officer. A council appointed by the Commanding Officer, 9th Air Base Group, from the members of the Trailer Park will act as advisors to the Custodian.

b. Administrative procedures will be in accordance with AF Regulation 176-1 and 176-2.

6. ASSIGNMENT AND TERMINATION OF ASSIGNMENT OF TRAILER SPACES:

a. Assignments and terminations of trailer spaces will be made by the Base Billeting Officer.

b. Trailer spaces will normally be assigned according to date of application. Priority will be given to persons holding positions as listed in Par 3d, Base Regulation 35-12.

c. Assignment of trailer park space will be terminated under the following conditions:

(1) When the base ceases to be the permanent station of the individual concerned.

(2) Upon failure to pay monthly fee.

(3) At such times as dependents no longer reside with officer or airman.

(4) At the discretion of the Base Commander when the conduct of occupant or dependent personnel warrant such action.

7. TRAILER PARK SPACE FEE: Occupants will be charged a monthly fee, to be determined by the Base Billeting Officer and the Council. Charges for utilities will be determined by Air Installations and forwarded to the Base Billeting Officer for collection.

8. POLICE OF THE TRAILER PARK :

a. Occupants will be responsible for police of the area surrounding space occupied.

b. Spaces which are not occupied will be policed jointly by occupants nearest unoccupied spaces.

c. Garbage and trash will be disposed of in containers provided.

d. Latrine facilities will be thoroughly policed daily and kept in satisfactory condition by a janitor chosen by the Council from a list of applicants residing in the Trailer Park. This janitorial service will be operated on a monthly basis whereby a new applicant will be selected each month. Members are required to use reasonable care to help keep the premises in good condition.

9. SPEED LIMIT WITHIN THE TRAILER PARK AREA :

a. The speed limit within the trailer park area will be ten (10) miles per hour.

b. Extreme caution will be exercised by all drivers of motor vehicles within the area as a further means of controlling traffic and protecting the lives of children using the area as a playground.

10. REPAIR AND REMOVAL OF GOVERNMENT PROPERTY :

a. All repairs and removal of government property will be made by Air Installations personnel only.

b. Requests for such work will be submitted by the Base Billeting Officer.

c. Approval will be secured from Air Installations before erecting structures in or near the Trailer Park Area.

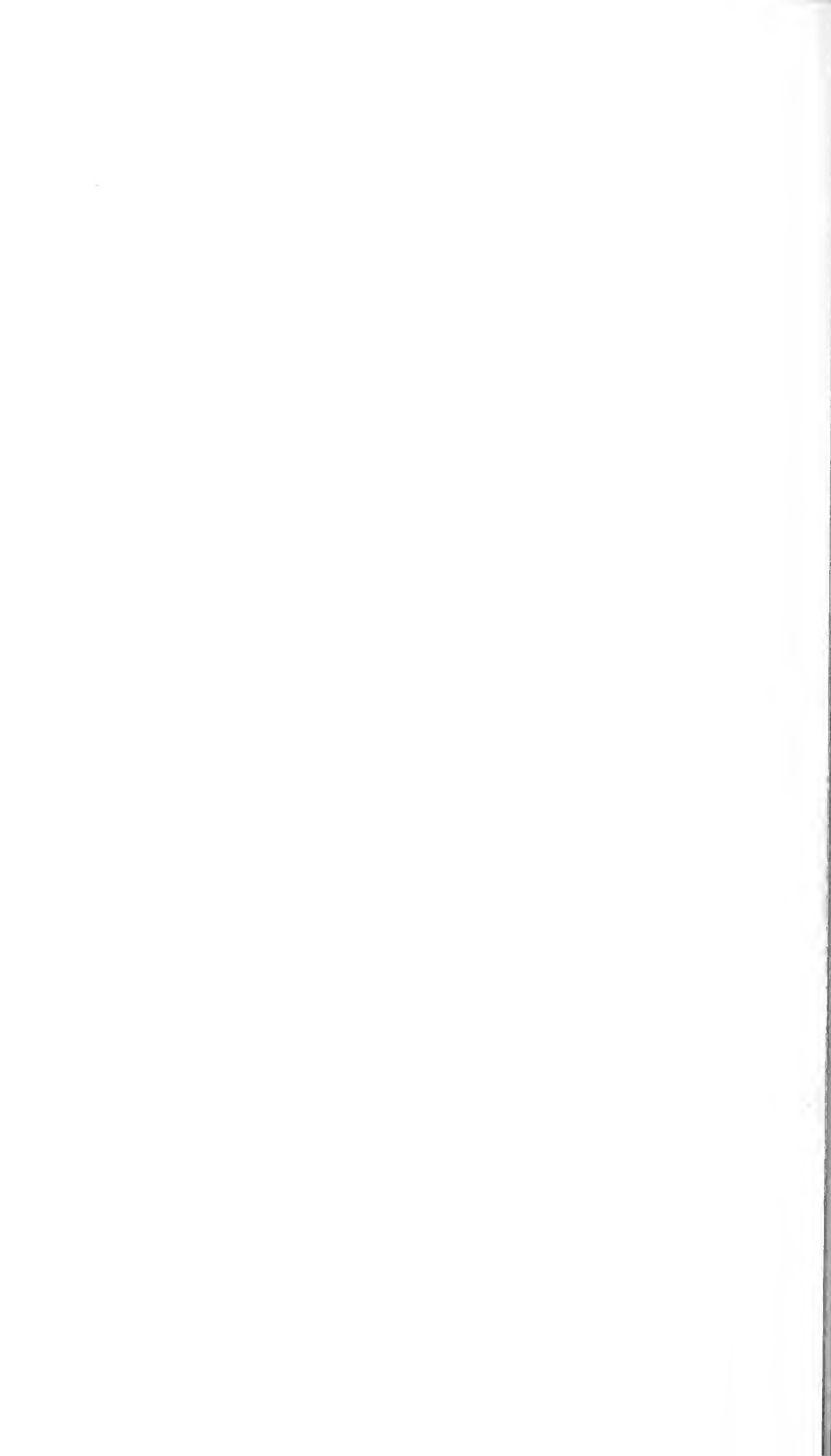
11. REGULATIONS GOVERNING SANITATION, PETS, ETC.:
The Fairfield-Suisun Trailer Park is a residential area and all existing regulations governing sanitation, pets, etc., will be observed by occupants and their guests.

By Command of BRIGADIER GENERAL TRAVIS:

ANDREW ZERBE,
Major, USAF,
Adjutant General.

OFFICIAL:

(S.) ANDREW ZERBE,
Major, USAF,
Adjutant General.



No. 13889.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PREFERRED INSURANCE COMPANY, a Corporation; MICHIGAN SURETY COMPANY, a Corporation; MID-STATES INSURANCE COMPANY, a Corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

FILED

WILLIAM H. LEVIT,
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FEB 11 1954

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' REPLY BRIEF.

1. The Question Involved.

The Government concedes that the decision of the District Court herein is tantamount to a holding that the Military Personnel Claims Act is the exclusive remedy of military personnel and civilian employees of the Defense Department for all service connected property damage losses (Govt. Br. pp. 5, 15, footnote 8; pp. 19-20, 22). It is therefore apparent, as contended by appellants (Op. Br.

p. 9, footnote 11; pp. 47-48) that the issue here involved is of far reaching importance and goes far beyond the subrogation rights of insurers, since it directly affects the claim rights of the millions of military and civilian personnel of the Defense Department.

2. The Feres Case Is Not Here Controlling.

In appellants' opening brief (pp. 11-52) we set forth a detailed analysis of the legislative and administrative history and construction of the various pertinent claims statutes, including the Gunfire Act of 1912, the Small Tort Claims Act of 1922, the Military Claims Act of 1943, the Military Personnel Claims Act of 1945 (and its predecessors) and the Tort Claims Act. We pointed out that it appeared therefrom that neither the Military Personnel Claims Act of 1945 (nor its predecessors) were construed as being the exclusive remedy of service personnel for service connected property damage losses, but on the contrary, for many years it had uniformly been held that service personnel were not only entitled to make claim for such property damage losses under the Military Personnel Claims Act, but also had the right to make claim therefor under any of the claim statutes applicable to civilians generally, including the various statutes above referred to. This appeared from the statutes themselves, from uniform rulings of the Judge Advocates General of the Armed Forces approving payment of such claims under the various claims statutes, from Congressional approval of such rulings by the appropriation of funds for such payments and by the amending of such statutes from time to time and the enactment of new claim statutes (including the Tort Claims Acts of 1946 and 1948) without ever providing that the Military Personnel Claims Act was to be

the exclusive remedy of military personnel for such losses.¹

In its brief, the Government completely ignores the foregoing.² It is submitted that in view of the importance of the question involved in this case, that the matters presented in appellants' brief deserve at least some evidence of consideration on the part of the Government. No doubt the Department of Justice is authorized to take any position it feels is proper in defending a lawsuit against the Government, but it does seem that when such position, if sustained, will have the effect of prejudicing the claim rights of millions of Government employees and of overruling long established administrative procedures, that consideration for the interests of such employees, if for no other reason, would require some discussion by the Government of these important issues.

¹The rule of Congressional acceptance and ratification of administrative interpretation, referred to in the Government's brief (Footnote 12, pp. 22-23), is particularly applicable and pertinent to the situation here existing.

²The Government gives a slight indication that it has read our discussion of the legislative and administrative history of the various statutes, JAG rulings, Regulations, etc., in Footnote 10, page 20, of its brief where, in connection with another point, the Government states that appellants have argued that the Army and Air Force have allowed military claimants to proceed either under the Military Personnel Claims Act or the Military Claims Act. This is obviously an inaccurate and incomplete statement of appellants' argument. Having so misstated appellants' argument, the Government says "the short answer to this argument is that the official Regulations promulgated by the Army and Air Force recognize the exclusive nature of the Military Personnel Claims Act remedy." While it must be conceded the Government's so-called answer is "short," it is neither accurate nor convincing. 32 C. F. R., Section 536.17, Army Regulations (App. Op. Br. p. 35), specifically provides that *service connected* property damage claims will "be considered *first*" under the Military Personnel Claims Act, but "*such claims* (referring to *service connected* property damage claims) found not to be payable" under the Military Personnel Claims Act *will then be processed* under the Tort Claims

The Government takes the position that the *Feres* case requires a holding that service connected property damage losses are compensable exclusively under the Military Personnel Claims Act. The *Feres* case involved a situation where 3 soldiers were injured while on active duty as a result of the alleged negligence of the Government, and the Supreme Court denied them the right to sue under the Tort Claims Act largely because no federal law, other than the compensation remedies available to soldiers, had ever recognized claims for service connected personal injuries, and because these compensation acts provided a system "of simple, certain and uniform compensation," and the benefits provided were adequate. In this situation, the Court concluded that these compensation benefits were intended by Congress to be the exclusive remedy for service connected personal injuries. The Government

Act and Military Claims Act. And 32 C. F. R., Section 836.103, Air Force Regulations, provides as follows:

"Claims within the scope of secs. 836.90 to 836.108 (Military Personnel Claims Act) which are also within the scope of regulations covering non-negligence claims (secs. 836.30 to 836.44, Military Claims Act of 1943), tort claims (secs. 836.10 to 836.25, Tort Claims Act) * * * will be *initially investigated and processed* under the provisions of secs. 836.90 to 836.108 which is preemptive of other claims regulations. Such claims will be forwarded through channels to the Judge Advocate General * * *. The determination of whether any such claims should be settled under other regulations will be made by the approving authority."

In other words, the Regulations provide that solely as a matter of administrative handling, service connected property damage claims are to be *initially* processed under the Military Personnel Claims Act, but those excluded from coverage or not fully covered under the regulations under said Act may then be paid under the other claim acts. And the Judge Advocates General have so ruled (Op. Br. pp. 24-26, 30-34).

The Government's mention (Br. p. 9) of House Report 237 wherein the proposed Military Personnel Claims Act of 1945 was referred to as a "single, clear, definite, and workable statute" is fully answered at pages 21-25 of Appellants' Opening Brief, where this Report is analyzed in detail.

also cites subsequent Supreme Court and Court of Appeals decisions reaching similar conclusions as to personal injury claims of other government employees whose injuries are covered under the Federal Employees Compensation Act. Says the Government (pp. 10-11), these cases are illustrative of the general rule that where Congress "through a series of enactments has legislated with respect to a particular subject matter in such a manner as to create a complete and comprehensive system for dealing therewith, subsequent statutes of general application * * * are * * * inapplicable." From this, the Government jumps to the conclusion that the Military Personnel Claims Act is the exclusive remedy for service connected property damage losses.

As pointed out in appellants' opening brief (pp. 41-42, 48-50), the *ratio decidendi* of these cases is not applicable to the problem here involved. For many years, service connected property damage claims have *not* been compensable exclusively under the Military Personnel Claims Act; on the contrary they have been cognizable also under the various claim statutes applicable to civilians generally. And, as we have shown when Congress enacted the Military Personnel Claims Act of 1945, *it specifically provided* that such act was not to be the exclusive remedy of service personnel for such losses, but that they were also to have the right to claim under the Military Claims Act of 1943, which latter act, in turn, was superseded by the Tort Claims Act of 1946 as to negligence claims. As was specifically noted by the Supreme Court in the *Johansen* case—

"As the government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions *without specific legislation to that effect.*"

Since Congress has provided that the Military Personnel Claims Act was not to be the exclusive remedy for service connected property damage losses, the *Feres* and related cases are not applicable.

As we have pointed out, the reason for different congressional treatment of service connected personal injury and property damage claims is apparent. The compensation remedies available to military and other government employees are certain, uniform and adequate. *Every soldier* who is injured on active duty, unless due to his own misconduct or intoxication, *is absolutely entitled* to receive a definite amount of compensation (see Op. Br. p. 49).³ The enforcement of these rights is provided for in great detail by the federal laws, including the right to various administrative hearings and appeals. And it has been held that there is a right of court review where such benefits are denied contrary to law (*Dismuke v. United States*, 297 U. S. 167).

On the other hand, the benefits provided by the Military Personnel Claims Act and the Regulations promulgated thereunder are not remotely comparable to such personal injury compensation benefits. That act confers no *rights* but is purely an act of grace with power in the officer passing on the claim to deny or reduce any claim in whole

³In addition to the statute there cited see 38 U. S. C. A., Section 151, which provides:

*"Every person (soldier) * * * who has been * * * disabled * * * shall * * * be entitled to receive * * * such pension * * *."*

And similarly the Federal Employees Compensation Act (31 U. S. C. A., Sec. 751), provides:

*"The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from a personal injury sustained while in the performance of his duty * * *."*

or in part and there is no right of appeal or review, administrative or court, from such action.

United States v. Huff (C. A. 5), 165 F. 2d 720.

And as we have noted (Op. Br. p. 21), the act and regulations contain numerous exclusions and restrictions as to type and amount of claims that may be paid.

While it is true that Congress *could* leave service personnel with such restricted rights (or with no claim rights at all) if it so desired, there is no reason, under the circumstances here existing, to restrict such rights, where Congress has indicated a contrary intent. The *Feres* case and the other cases relied upon by the Government were at pains to point out the adequacy and fairness of the awards recoverable under the compensation acts (Op. Br. pp. 48-49). For example, in *Firth v. U. S.* (207 F. 2d 665), this Court specifically noted that the benefits recoverable under the compensation act would be greater than the amount awarded by the judgment in the District Court, and it remanded the case without prejudice to the claimant's right to claim such compensation. The Government would here have this Court distort the ruling in the *Feres* case, with the result that the claim rights of military personnel would be greatly restricted. It is submitted that no reason exists for such a harsh result; especially since it is contrary to the intent of Congress.

3. The Losses Were Not Service Connected.

The Government here urges a point not urged by it in the District Court. The Government argues that since the Military Personnel Claims Act provides that "any *such settlement* * * * shall be final and conclusive for all purposes," and since the air force personnel filed claims

for certain uninsured property losses which were paid, such "*determination*" by the Air Force that the damage was incident to service is determinative of that issue in this action.

No pertinent authority is cited in support of this argument. The statute says only that the *settlement* shall be final. It is submitted that the statute means only what it says, viz., that the soldier can make no further claim for the articles covered by the claim; nor can the Government refuse to pay the amount allowed.⁴ The statute does not say that the incidental *determination* by the Air Force that the claim was service connected shall be binding in an action brought under the Tort Claims Act upon a separate claim that was never presented to the Air Force. The Stipulation of Facts recites that when the soldiers filed their uninsured claims they had already been paid by the insurers for the trailer losses, and the claims they filed with the Air Force specifically set this forth (see Op. Br. p. 5). Since the insurers owned the claims for the trailer damage at that time and since the insurers took no part in presenting any claim to the Air Force, such determination upon the soldiers uninsured claims could not bind the insurers (see Op. Br. pp. 65-66).

The Government seeks to distinguish *Lund v. United States*, 104 Fed. Supp. 756, upon the ground that there had been no prior administrative determination in that case that the loss was service connected; therefore, the District Court was free to make such determination itself. This could not be a sound analysis of that decision. In any

⁴For example, *United States v. Babcock*, 250 U. S. 328 (Govt. Br. p. 16), merely holds that when a claim has been allowed by military authority under the Military Personnel Claims Act, the Government may not obtain a court review of such allowance.

particular case, the loss is either service connected or it is not. If the Government's position is correct, exclusive jurisdiction of service-connected property damage losses is in the Air Force, and the soldier could not confer jurisdiction on the District Court to hear the case, merely by by-passing the Air Force. Factually, the *Lund* case and the instant losses are similar, and if the loss in the *Lund* case was not service connected, neither are the instant losses. To be consistent, the Government would have to disagree with the conclusion of the District Court in the *Lund* case, but this it does not do. It is submitted that the *Lund* case is well reasoned and the conclusion that the loss was not service-connected is sound and here pertinent.

The Government argues (pp. 17-18) that the issue of whether the loss was service-connected should be determined by reference to rules applicable to workmen's compensation claims; *e. g.*, if the condition of employment creates a "zone of special danger" out of which the injury arose, the loss should be held to be service connected. Again the Government raises a point that was not suggested by it in the District Court. In any event, the rules applicable to workmen's compensation claims are not controlling or of assistance in determining whether a property damage claim of a soldier is service-connected. There are a number of federal cases decided under the Tort Claims Act and a large body of Judge Advocates General rulings which consider and determine whether various personal injury and property damage claims are service-connected under the Tort Claims Act and other military claims statutes. Why the Government asks this Court to ignore this large body of court and administrative law on the very point in issue and look to workmen's compensation cases is not clear. These cases and rulings are set forth in

Appellants' Opening Brief (pp. 53-62). The Government completely ignores the cases and dismisses the Judge Advocates General rulings with the brief comment that they "turn on the facts peculiar to them" (p. 16, footnote 9, Govt. Br.). An examination of these cases and rulings shows that they are pertinent in deciding whether the instant losses were service connected. These cases and rulings announce two situations where losses are uniformly held not to be service-connected (1) where the loss occurs when the soldier is off duty,⁵ and (2) where the soldier is making use, for his own convenience, of a government facility which he is not ordered to use. Both of these situations existed in the case at bar.

That the workmen's compensation "zone of special danger" rule is not applicable here also appears from the case of *Herring v. United States*, 98 Fed. Supp. 69 (App. Op. Br. p. 55), where the court noted that under the *Feres* and *Brooks* cases, "the source and circumstances of the injury are relatively unimportant," the determining factor being *the duty status* of the soldier. Likewise, the *Brown*, *Samson* and *Lund* cases and the various Judge Advocates General rulings (App. Op. Br. pp. 56-62) make clear that the "zone of special danger" is not the test to be applied here, since they dealt with losses occurring in the "zone of special danger," and yet were held not to be service connected.

⁵In a very recent decision, it was reaffirmed that under the rule of the *Feres* case the injury cannot be said to "arise out of or in the course of activity incident to service" if it occurs when the soldier is *off duty*. See *Brown v. United States* (C. A. 2, Jan. 5, 1954), opinion by Frank, Circuit Judge, referred to in 22 United States Law Week 2320. Incidentally, in this opinion the court refused to follow *O'Neil v. United States* (C. A., D. C.), 202 F. 2d 366, cited in the Government's Brief, page 14.

In connection with the service-connected issue, mention should also be made of the reference by the Government in its Statement of Facts (Br. p. 3) to the affidavit filed by it in support of its motion to dismiss wherein it was stated that the personnel "were on active duty, and duly assigned to military functions, at and about the time of the said crash." This motion was submitted to the District Court on a Stipulation of Facts [Tr. pp. 13-22] and said affidavit formed no part thereof, is contrary to the Stipulation, and should be disregarded on this appeal. The portion of the Stipulation here pertinent is set forth in subparagraph 14 and footnote 4, page 4 of Appellants' Opening Brief.

4. The Rules Applicable to Subrogation.

It may be conceded that an insurer may not subrogate if the insured had no right to sue the tortfeasor at the time the insurer paid the loss. As pointed out in our Opening Brief, it is immaterial that the Military Personnel Claims Act does not provide for the allowance of subrogated claims since this suit is brought under the Tort Claims Act which does recognize such claims (Op. Br. pp. 44, 48).

The Government argues (p. 23) that the provision in the Military Personnel Claims Act excluding subrogation claims bars this suit under the Tort Claims Act, citing cases holding that provisions in bills of lading giving carriers the benefit of a shipper's insurance preclude an insurer from subrogating against the carrier. These cases and this argument are not here relevant for the following reasons:

(1) This action is cognizable and brought under the Tort Claims Act; therefore the provisions of the Military Personnel Claims Act are irrelevant.

(2) The bill of lading cases recognize that if the losses are paid under loan receipts or if the policy has a provision that the insurance shall not inure to the benefit of a carrier or bailee, the insurer may then subrogate, irrespective of the provisions of the bill of lading. To this effect, see

Luckenbach v. McCahan Sugar Co., 248 U. S. 139,
39 S. Ct. 53, 63 L. Ed. 170;

Mode O'Day Corp. v. Ringsby Truck Lines, Inc.,
100 Cal. App. 2d 748, 224 P. 2d 368.

The Government did not urge this point in the District Court; hence the Stipulation of Facts did not cover the question of whether the losses were paid under loan receipts or whether the policies contain a provision such as referred to above. Under these circumstances, the Government may not raise such a point for the first time in this Court.

(3) In any event the bill of lading cases do not deal with an analogous problem and are not here pertinent.

Respectfully submitted,

WILLIAM H. LEVIT,

LONG & LEVIT,

Attorneys for Appellants.

**In the United States Court of Appeals
for the Ninth Circuit**

No. 13889

PREFERRED INSURANCE COMPANY, A CORPORATION; MICHIGAN SURETY
COMPANY, A CORPORATION; MID-STATES INSURANCE COMPANY, A COR-
PORATION; AND THE MERCANTILE INSURANCE COMPANY OF AMERICA, A
CORPORATION, APPELLANTS

v.
UNITED STATES OF AMERICA, APPELLEE

No. 14001

FIDELITY-PHENIX FIRE INSURANCE CO., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14002

ALBERT G. WHIPPLE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14003

GEORGE STROBECK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14004

GOVERNMENT EMPLOYEES INSURANCE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 14005

ST. LOUIS FIRE & MARINE INSURANCE COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION**

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

WARREN E. BURGER,
Assistant Attorney General.

LLOYD H. BURKE,
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MORTON HOLLANDER,
Attorneys, Department of Justice.

13889, etc

FILED

DEC 7 1954

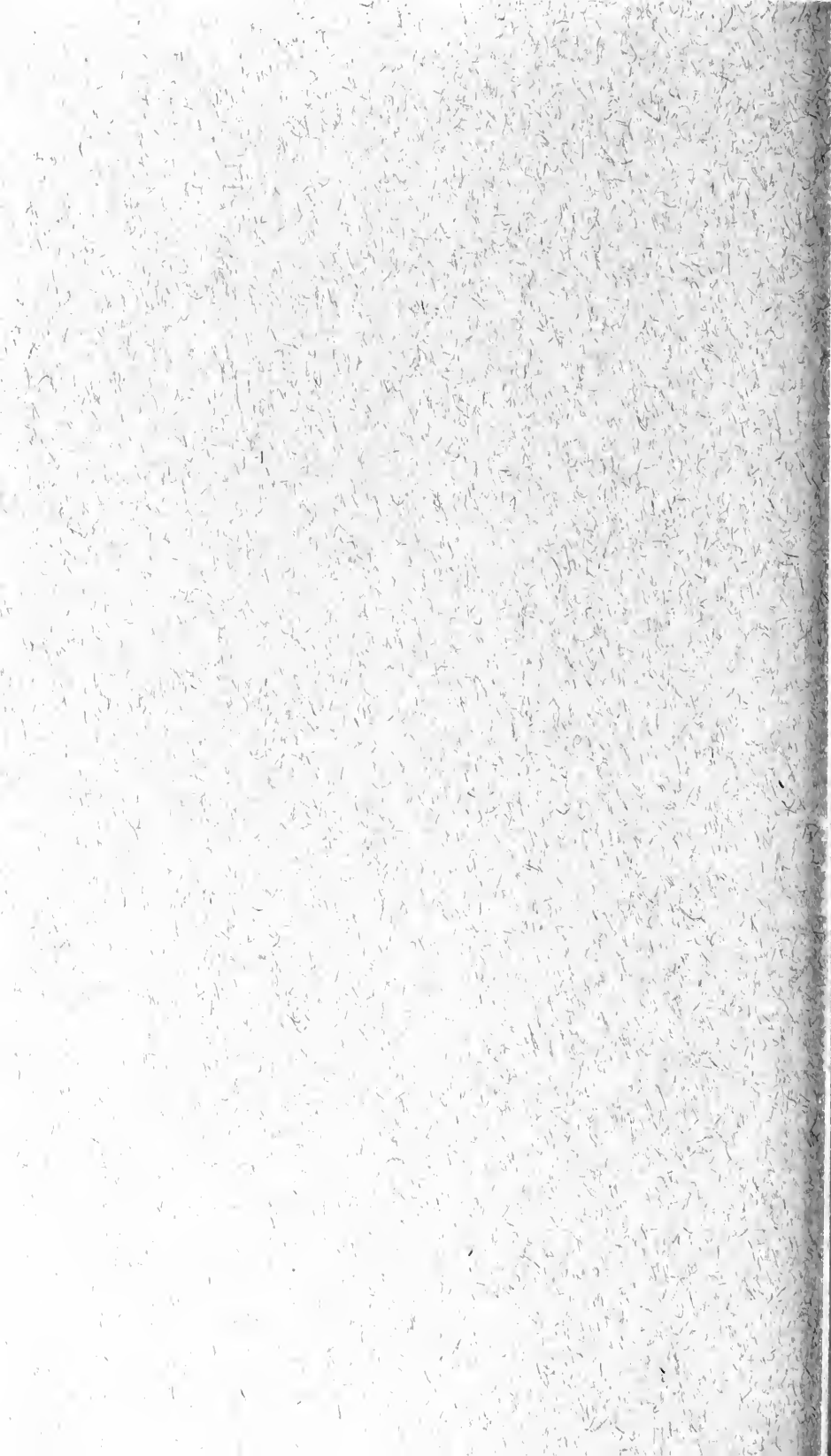
PAUL P. O'BRIEN,
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PAUL P. O'BRIEN,

DEC 7 1954

FILED



**In the United States Court of Appeals
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PREFERRED INSURANCE COMPANY, A CORPORATION; MICHIGAN SURETY COMPANY, A CORPORATION; MID-STATES INSURANCE COMPANY, A CORPORATION; AND THE MERCANTILE INSURANCE COMPANY OF AMERICA, A CORPORATION, APPELLANTS

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FIDELITY-PHENIX FIRE INSURANCE CO., APPELLANT

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v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTH-
ERN DIVISION

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Our main brief in the *Preferred Insurance* case, No. 13889, was filed and served in January, 1954.¹ The

¹The *Preferred* appeal has, by court order, been consolidated with the five other appeals in *Fidelity-Phenix Fire Insurance Co. v. United States*, No. 14001; *Albert G. Whipple v. United States*, No.

basic question in the case, as noted at page 2 of that brief, is whether the Military Personnel Claims Act constitutes the exclusive remedy for claims against the United States for damage to personal property occurring incident to service and hence precludes resort to the Federal Tort Claims Act.

This identical question has now been decided by the Court of Appeals for the Fifth Circuit in *Zoula and Sterling v. United States* (No. 14901, C. A. 5), a case which arose out of a factual situation on all fours with the instant cases. In its opinion in the *Zoula and Sterling* case, handed down November 24, 1954, the court of appeals squarely held that "the Military Personnel Claims Act furnishes the exclusive remedy and precludes resort here to the Federal Tort Claims Act." (Appendix, *infra*, p. 8). Chief Judge Hutcheson's opinion for the court and Judge Russell's concurring opinion are set out in full in the Appendix.

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DECEMBER, 1954.

14002; *George Stropeck v. United States*, No. 14003; *Government Employees Insurance Company v. United States*, No. 14004; and *St. Louis Fire & Marine Insurance Company v. United States*, No. 14005.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14901

EMIL ZOULA AND CHARLES C. STERLING, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the
Middle District of Georgia

(November 24, 1954)

Before HUTCHESON, Chief Judge, and HOLMES and
RUSSELL, Circuit Judges

HUTCHESON, Chief Judge:

Having sustained injuries to person and property in an automobile collision on the Fort Benning Military Reservation with an army ambulance as the result of the alleged negligence of its driver, plaintiffs, members of the armed forces in service at the post, sued under the Federal Tort Claims Act to recover therefor.

The causes consolidated for hearing and plaintiffs' and defendant's motions for summary judgment coming on to be heard on affidavits and evidence, the district judge, upon the undisputed facts and for the reasons¹

¹ "On July 19, 1952, the plaintiffs, Emil Zoula and Charles C. Sterling, Jr., were on a tour of military duty at the Fort Benning Military Reservation. These gentlemen occupied the status of students. There were about 150 in their company.

On July 19, 1952, at about one o'clock in the afternoon, while occupying the automobile owned by Sterling and proceeding from the Harmony Church area in the Reservation to the main post, they

set out in his memorandum for judgment, denied plaintiffs', and granted defendant's, motion for judgment.

Appealing from the judgments denying them recovery, plaintiffs are here urging upon us that *Brooks*

were run into by a soldier driving an ambulance, and apparently, although not now adjudging, the result of the collision was wholly due to the negligence of the soldier driving the ambulance.

At the time of the collision resulting in the injuries sued for, both the Plaintiffs were dressed in civilian clothes, were on business of their own, going from one part of the Reservation to another, for the purpose of getting a check cashed, a hair-cut, making measurements for some clothes, probably spending the week end in town.

The 150 men composing the company of students, of which these two Plaintiffs were members, had issued to them and accessible to them at all times a Class A pass or Class A passes. The evidence disclosed that these men might have carried these passes on their person; but the rule seems to have been that ordinarily and generally speaking these passes were left at a point but could be picked up by these Plaintiffs and all other members of that company who were not being disciplined at any time after five o'clock in the afternoon of week days and twelve o'clock noon on Saturday.

They did not have to apply to anyone to obtain these passes. All that was necessary was that they go by, sign a book or a register, giving the place where they were going, and pick up their pass and depart. All 150 in this company had the same privilege except those kept on the bases for disciplinary purposes.

I do not understand that a pass of this type is synonymous with either a furlough or a leave, it being made to appear that a furlough and leave are synonymous except one applied to an enlisted man and the other to an officer. The fundamental difference between a pass and a leave or furlough is that a furlough or leave is a right earned and to which the soldier is entitled. A pass is simply a privilege that may or may not be accorded him.

The evidence in this case, as well as the facts of the complaints and the affidavits attached, show that the real substantial question is, what was the status of these plaintiffs at the time of their injury? These men, being on a pass status, were still connected with the subject to call at all hours.

It has been made to appear that these plaintiffs and all others of their company occupying like status would be required to return to the base if night problems were involved or would probably not be granted the right to leave. A person on a furlough or leave is not subject to military duty, although he may actually spend the time

v. *United States*, 337 U. S. 49 and the district court cases² cited by them, as to the personal injuries sustained, and *Lund v. United States*, 104 Fed. Supp. 756, as to the property damages sued for, require a contrary holding.

The United States on its part advancing three propositions³ and arraying many statutes and decisions in support of them, vigorously urges upon us that the judgments appealed from were correctly entered and should be affirmed.

provided in the furlough or the leave on a military reservation. A person on pass status is required to attend night problems. A person on furlough or leave is not required to attend night problems. The collision that occurred out of which this damage grew happened upon the military reservation.

It is difficult for me to determine what status the personal property damage occupies. It would be almost cruel to prohibit these two young men from recovering for their property damage. Yet I am persuaded to believe that their right to recover is in one lump, and if they cannot recover for their personal injury, they could not recover for their property damage.

It is my judgment, from the evidence in this case, from the facts obtained in the affidavits and from the petitions, that the injuries resulting to these men arose out of or incident to their military service. I, therefore, decline and deny the motion for summary judgment of the Plaintiffs and grant the motion for summary judgment of the United States."

² *Herring v. U.S.*, 98 Fed. Supp. 69; *Samson v. U.S.*, 79 Fed. Supp. 406; *Brown v. U.S.*, 99 Fed. Supp. 685; *Barnes v. U.S.*, 103 Fed. Supp. 151; *Snyder v. U.S.*, 118 Fed. Supp. 585.

³ "I. The Existence of a Comprehensive and Uniform Federal System of Compensation Benefits for Injuries or Death of Servicemen Precludes Recovery of Additional Damages Under the Federal Tort Claims Act."

"II. In Any Event There Can Be No Recovery Under the Federal Tort Claims Act of Damages for the Service-Incident Injury of a Member of the Armed Forces."

"III. The Military Personnel Claims Act Remedy Precludes an Action by a Member of the Armed Forces Under the Federal Tort Claims Act for Property Damage Incident to His Service."

In respect of the claims for personal injuries, the United States, pointing to the numerous statutes dealing with and providing for administrative compensation, puts forward as its primary reliance the existence of a comprehensive and uniform Federal System of Compensation Benefits for injuries or death of servicemen and the decision in *Feres v. United States*, 340 U. S. 135, holding that the existence thereof precludes resort by servicemen or their dependents to the Federal Tort Claims Act.

To appellants' insistence that the Brooks and not the Feres case is controlling here, appellee replies correctly, we think, that it is the Feres and not the Brooks case which states the generally controlling principles where servicemen are concerned, and that to the extent that the Brooks case is still the law, it should be, and is, confined within the narrow limits of its precise facts.

In respect of the property damage claim of plaintiff Sterling, the United States, citing in support *Fidelity Phenix v. U. S.*, 111 Fed. Supp. 899-903, relies with equal, if not greater, assurance on the additional reason that the complete and comprehensive system of administrative compensation for property damage sustained by military personnel incident to their service, precludes resort by members of the armed services to the Tort Claims Act for such property damage.

We find ourselves in general agreement with these positions taken by appellee. Of the clear opinion that to the extent that the decision of the Supreme Court in the Brooks case has survived the decision in the Feres case, it must and will be confined strictly to its precise facts, we are of the equally clear opinion that the facts of this case do not bring it within those narrow confines.

This is to say that only if the majority opinion in the Brooks case can be regarded as laying down the general rule covering the application of the Federal Tort Claims Act to men in the armed forces, and the Feres case a narrow exception to it, could the plaintiffs in this case prevail. It is to say, too, that the undisputed facts in this case bring plaintiffs within the intent and meaning, indeed within the precise language of the Feres case, "The government is not liable under the Federal Tort Claims Act for injuries to servicemen where [as here] the injuries arise out of, or are in the course of, activity incident to service", for, as the district judge pointed out in his memorandum, while the plaintiffs were in civilian clothes and entitled to a pass, they were still on the post and still "in the course of activity incident to service." Unless, therefore, the carefully chosen words used in the Feres opinion are to be given the confined and unnatural meaning, sought to be attributed to them by appellants, that to come under the decision, servicemen must be injured as a result of, or while acting under, immediate and direct military orders, it is quite plain that plaintiffs may not recover.

The Supreme Court pointed out in the Feres case, that the benefits currently available under the statutory system developed by congress in the many enactments dealing with and providing for compensating servicemen or their dependents for injury or death in service were not only adequate and comprehensive, but also compared "extremely favorably with those provided by most compensation statutes." *Feres v. United States*, 340 U. S. 145.

The argument made so much of in, and apparently greatly influencing the dissenting opinion in the Court

of Appeals and the majority opinion in the Supreme Court in the Brooks case, that it would be a discrimination against servicemen to deny them the benefits of the Federal Tort Claims Act, congress certainly did not intend to discriminate against servicemen, was, we think, completely demolished in the Feres case.

We think, too, that the opinion in that case and later decisions of the Supreme Court and other courts interpreting and applying the Feres case ⁴ have deprived of any sound basis the views apparently put forward in Brooks' case, that it would be discrimination against a serviceman to remit him to the compensation provided by congress and that in enacting the Federal Tort Claims Act, congress intended to afford servicemen two remedies against the government.

As to the damage to plaintiff Sterling's automobile, it will be sufficient, without extending this opinion further, to say that in our opinion the Military Personnel Claims Act ⁵ furnishes the exclusive remedy and precludes resort here to the Federal Tort Claims Act.

The judgment was right. It is AFFIRMED.

RUSSELL, Circuit Judge, concurring specially:

In this case there is no occasion to choose between the Brooks case and the Feres case. Under the authority of the Feres case, recovery for injuries sustained incident to the military service is not authorized under

⁴ Johansen v. U.S., 343 U.S. 427; Dalehite v. U.S., 346 U.S. 15; Lewis v. U.S., 190 F(2) 22; Pettis v. U.S., 108 Fed. Supp. 500; Sigmon v. U.S., 110 Fed. Supp. 906; O'Neil v. U.S., 202 F(2) 366; Mandel v. U.S., 191 F(2) 164; U.S. v. Firth, 207 F(2) 665; and U.S. v. Meyer, 200 F(2) 110. Cf. Posey v. Tennessee Valley Authority, 93 F(2) 726.

⁵ The Military Personnel Claims Act of May 29, 1945, 91 Congressional Record, 4804, 5445.

the Federal Tort Claims Act. The question presented here is whether the injuries complained of were so sustained. The trial judge found that they were, therefore, since this judgment is adequately supported by the record, it should be affirmed. Being of this view, I do not reach the question of the applicability of the Military Personnel Claims Act.



No. 13890

In the United States
Court of Appeals
for the Ninth Circuit

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,

Appellant,

vs.

UNITED TRUCK LINES, INC.,
a corporation,

Appellee.

APPELLANT'S BRIEF

**Appeal from the Order of Dismissal of the District Court
of the United States for the District of Oregon**

HON. GUS J. SOLOMON, Judge

FILED

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OCT 22 1953

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No. 13890

**In the United States
Court of Appeals
for the Ninth Circuit**

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,
Appellant,

vs.

UNITED TRUCK LINES, INC.,
a corporation,
Appellee.

APPELLANT'S BRIEF

**Appeal from the Order of Dismissal of the District Court
of the United States for the District of Oregon**

HON. GUS J. SOLOMON, Judge

STATEMENT OF THE CASE

The complaint before the District Court, Paragraph II, alleges that plaintiff (appellant here) and defendant (appellee here) are motor carriers subject in their interstate operations to the jurisdiction of the Interstate Commerce Commission under the

Interstate Commerce Act. By Paragraph IV plaintiff asserts it operated interstate over a designated highway by express permission of the Interstate Commerce Commission. By Paragraph V it is claimed that defendant operated interstate over the same highway without such permission. Paragraph VI says that defendant's illegal operation diverted traffic from plaintiff and Paragraph VII claims that plaintiff is entitled to monetary damages because of "such unlawful operations" (Tr. 3-6). These allegations present a clear claim of the violation of a right federally protected under the Interstate Commerce Act. There is no diversity presented by the record, both parties being Washington corporations, so the only question before this Court is, does the complaint present a federal question?

Appellee, United, moved to dismiss contending that, although the claim arises as a result of the alleged violation of a Federal statute, it is a common law cause of action; the right to freedom from illegal competition. We agree that the right of a franchise holder to recover damages from one who unlawfully infringes is a common law right so there is no issue here on that point and we have not briefed it. If, however, the Court is interested in the question, it is spelled out in detail, with authorities, in the record (Tr. 7-10).

The District Court allowed the motion and ordered a dismissal holding that no federal question is involved (Tr. 15-16). Though the order says it is "without prejudice" (Tr. 20), the oral opinion upon which it was based (Tr. 14-19) categorically denies appellant's right to assert a claim for damages based upon appellee's violation of the Federal Motor Carrier Act (49 U.S.C.A. Sec. 301 et seq.). The order is thus, in effect, a final judgment so that this Court has jurisdiction of this appeal. *In re Melekov*, 114 F. (2d) 727 (C.C.A. 9), and cases there cited.

Appellant contends that the complaint presents a federal question on either of two grounds which are set forth herein. Our first point is that this action for money damages caused by a violation of the Interstate Commerce Act presents a federal question notwithstanding the fact that the statute does not expressly confer such right. The second point is that the Act (49 U.S.C.A. Sec. 317(b)) expressly reserves all common law remedies and thereby incorporates them into the Act.

POINTS AND AUTHORITIES

POINT I

A COMPLAINT ALLEGING A VIOLATION OF THE FEDERAL MOTOR CARRIER ACT TO PLAINTIFF'S MONETARY DAMAGE PRESENTS A FEDERAL QUESTION EVEN THOUGH THE ACT DOES NOT SPECIFICALLY PROVIDE FOR SUCH DAMAGES.

Interstate Commerce Act, Part I (49 U.S.C.A. Sec. 1, et. seq.);

id., Part II (49 U.S.C.A. Sec. 301 et. seq.);

Fratt v. Robinson, 203 F. (2d) 627;

Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78(a) et. seq.);

Baird v. Franklin, 141 F. (2d) 238;

Bell v. Hood, 327 U.S. 678;

28 U.S.C.A. 41(1), (7) (28 U.S.C.A. Secs. 1331, 1337).

Argument

The District Court correctly pointed out that Sections 8 and 9 of Part I of the Interstate Commerce Act dealing with railroads (49 U.S.C.A. Sec. 1, et. seq.) specifically provide for a right to proceed in Federal Court for money damages to any person aggrieved by any violation of that chapter (the railroad chapter) of the Act. It then took the position that since the Motor Carrier Act does not contain

similar provisions no federal question is presented by appellant's complaint.

We can find no case holding that a complaint alleging a violation of the Federal Motor Carrier Act and seeking money damages presents a Federal question. We believe the exact question has never before been raised. There is, however, an exactly comparable case decided in this Court arising in connection with the Securities and Exchange Act.

That case, which we feel is indistinguishable in principle from this case is *Fratt v. Robinson*, 203 F. (2d) 627. It involved a suit for money damages resulting from a violation of Section 10(b) of the Securities and Exchange Act (15 U.S.C.A. Sec. 78j(b)). That section does not provide for money damages though other sections do. However, this Court squarely held that a Federal District Court had jurisdiction to award damages for a violation of Section 10(b). 203 F. (2d) at p. 631). In so doing this Court adopted the reasoning of Judge Clark of the Second Circuit in *Baird v. Franklin*, 141 F. (2d) 238, to the effect that the entertaining of such jurisdiction would make more effective the general purposes of the Act. This Court said:

“* * * We can think of nothing that would tend more toward discouraging trading off the established business markets and out of govern-

mental regulation or that would more certainly tend to deter fraudulent practices in security transactions and thus make the Act more 'reasonably complete and effective' than the right of defrauded sellers or buyers of securities to seek redress in damages in federal courts * * * (203 F. (2d) at p. 632).

This Court's final comment in holding that a Federal District Court had jurisdiction to award money damages even though the portion of the statute alleged to have been violated did not expressly provide for them was:

"* * * It is not unusual for courts to take jurisdiction of civil remedies where the legislature has spoken only of criminal sanctions." (203 F. (2d) at p. 633.)

In reaching the result it did in the *Fratt* case, this Court relied heavily on *Bell v. Hood*, 327 U.S. 678, which had been appealed from this Court. That case involved a claim for money damages against officers of the Federal Bureau of Investigation because of their alleged violations of the Fourth and Fifth Amendments to the United States Constitution. The Supreme Court held there was jurisdiction to try such claim and that the claim *presented a Federal question*. This Court in the *Fratt* opinion quoted

from the Supreme Court's opinion in the *Bell* case on the Federal question point as follows:

“* * * where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and *a federal statute provides for a general right to sue for such invasion*, federal courts may use any available remedy to make good the wrong done. Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C §41(1) and on a determination of the scope of the Fourth and Fifth Amendments' protection from unreasonable searches and deprivations of liberty without due process of law. Thus, *the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction.*” (Footnote 18, p. 633, 203 F. (2d); italics added.)

In the *Bell* case, the *Fratt* case and in the case at bar the statute or Constitution does not specifically say that a party damaged because another violated the law has a right to bring an action for damages in the Federal Court. But the *Bell* and *Fratt* cases hold that such a case arises under the “Constitution, laws or treaties of the United States” (28 U.S.C.A. Sec.

1331). We pleaded and rely upon 28 U.S.C.A. Sec. 1337 which confers jurisdiction, so far as here material, “* * * of any civil action arising under any Act of Congress regulating commerce * * *”. Accordingly, since the Supreme Court in the *Bell* case thought a Federal question was presented by a complaint seeking money damages under Sec. 1331 and the Fourth and Fifth Amendments to the United States Constitution, though neither the Constitution nor the statute expressly provides for them, it seems obvious that a Federal question is presented here where Sec. 1337 and the Federal Motor Carrier Act are involved, neither providing expressly for money damages.

We have seen that this Court in the *Fratt* opinion held upon the authority of the *Bell* case that a complaint seeking money damages for violation of a Federal statute raised a Federal question even though the portion of the statute which was alleged to have been violated did not provide for damages for that violation. We think a comparison of the Securities Exchange Act of 1934 which was involved in the *Fratt* opinion with the Federal Motor Carrier Act involved in this case will show that what was said in the *Fratt* opinion applies here. As footnote 13 to the *Fratt* opinion (p. 632 of 203 F. (2d)) correctly points out, Sections 9(e), 16(b) and 18(a) of the

Securities Exchange Act, all provide rights to damages for violations of *those* sections. Section 10(b), the section involved in the *Fratt* opinion, does not. Even as against the maxim *expressio unius est exclusio alterius*, Judge Clark in *Baird v. Franklin* had held that the violation of another “non-damage” section of the Act did not foreclose a right to money damages. As to Section 10(b), this Court said it agreed with Judge Clark.

Except for its reservation of common law remedies (dealt with in Point II below), the Federal Motor Carrier Act is silent as to any private remedy for a violation of any of its provisions. All it does is provide for criminal penalties and injunctive remedies to be sought by the Commission. Accordingly, the *expressio unius* rule is no barrier here, and the rule of the *Fratt* opinion applies *a fortiori*.

POINT II

THE FEDERAL MOTOR CARRIER ACT BY RESERVING COMMON LAW REMEDIES CREATED A FEDERAL RIGHT COGNIZABLE IN A DISTRICT COURT AS A FEDERAL QUESTION.

POINTS AND AUTHORITIES

Interstate Commerce Act, Part II, Sec. 317(b)
 (49 U.S.C.A. Sec. 317(b));
id., Part I, Sec. 22 (49 U.S.C.A. Sec. 22);

Puerto Rico v. Russell & Co., 228 U.S. 476;
Gully v. First National Bank, 299 U.S. 109;
Penna R.R. v. Sonman Coal Co., 242 U.S. 120;
Penna R.R. v. Puritan Coal Co., 237 U.S. 121;
 Plaintiff's pleadings in the *Puritan* and *Sonman* cases (Exs. A and B hereto);
Powers v. Cady, 9 F. (2d) 458;
Artic Roofings v. Travers, 32 A. (2d) 559 (Del. 1943);
Union Transfer Co. v. Renstrom, 37 N.W. (2d) 383 (Neb. 1949).

Argument

The proviso to Sec. 317(b) of the Federal Motor Carrier Act reads as follows:

“* * * Provided, That the provisions of Sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.” (49 U.S.C.A. 317(b)).

Sec. 22, so far as here material, reads as follows:

“* * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; * * *” (Act of 1887, now 49 U.S.C.A. Sec. 22.)

It goes without saying that *if* Sec. 22 was intended to create a federal right, the District Courts have

jurisdiction to enforce it. The District Court in this case expressly held that it was not so intended (Tr. first full para. p. 18). In reaching that conclusion the Court relied upon *Puerto Rico v. Russell & Co.*, 228 U.S. 476, and *Gully v. First National Bank*, 299 U.S. 109. Both of these cases stand for the proposition that where an Act of Congress *permits* a state tax to be levied, the right to be established is one created by the State and that the Federal enabling act does not create a Federal right and hence a federal question. In this case Sec. 22 is *Congressional legislation* so the *Puerto Rico* and *Gully* cases have no application.

Our first reason for contending that in enacting Sec. 22 Congress intended to create a federal right is that, even if Congress had not so enacted, it would have been possible to assert a common law action for illegal competition in a state court. Accordingly, if Congress wasn't trying to create a federal cause of action, it is difficult to see what Congress was trying to do. It must be presumed that the words were intended for some purpose or to accomplish something.

However, we are not relying merely on logic. Except for the District Court's opinion in this case, Sec. 317(b) of the Federal Motor Carrier Act has

never been construed by a Federal Court. The scope and meaning of Sec. 22 has been considered many times. The clearest statement we have been able to find is that in *Penna. R.R. v. Sonman Coal Co.*, 242 U.S. 120. That involved a common law action for failure to deliver coal cars and came to the Court from the Supreme Court of Pennsylvania. True, the carrier had been held liable in a State, not a Federal, Court. But the Court held it to have also been suable in a Federal Court as follows:

“It is true that §§8 and 9 deal with the redress of injuries resulting from violations of the act and give the person injured a right either to make complaint to the Interstate Commerce Commission or to bring an action for damages in a federal court, but not to do both. If the act said nothing more on the subject it well may be that no action for damages resulting from a violation of the act could be entertained by a state court. But the act shows that §§8 and 9 did not completely express the will of Congress as respects the injuries for which redress may be had or the modes in which it may be obtained, for §22 contains this important provision: ‘Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.’ The three sections, if broadly construed, are not altogether harmonious, and yet it evidently is intended that all shall be operative. Only by read-

ing them together and in connection with the act as a whole can the real purpose of each be seen. They often have been considered and what they mean has become pretty well settled. Thus we have held that a manifest purpose of the provision of §22 is to make it plain that such 'appropriate common law or statutory remedies' as can be enforced consistently with the scheme and purpose of the act are not abrogated or displaced, *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446-447; that this provision is not intended to nullify other parts of the act, or to defeat rights or remedies given by earlier sections, but to preserve all existing rights not inconsistent with those which the act creates, *Pennsylvania R.R. Co. v. Puritan Coal Co.*, 237 U.S. 121, 129; that the act does not supersede the jurisdiction of state courts in any case, new or old, where the decision does not involve the determination of matters calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission, or relate to a subject as to which the jurisdiction of the federal courts is otherwise made exclusive, *ibid.* 130; that claims for damages arising out of the application, in interstate commerce, of rules for distributing cars in times of shortage, call for the exercise of the administrative authority of the Commission where the rule is assailed as unjustly discriminatory, but where the assault is not against the rule but against its unequal and discriminatory application, no administrative question is presented and the claim *may be prosecuted in either a federal or a state court*

without any precedent action by the Commission *ibid.* 131-132; and that, if no administrative question be involved, as well may be the case, a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, *may be enforced in either a federal or a state court* without any preliminary finding by the Commission, and this *whether the carrier's default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act, ibid.* 132-135; *Eastern Ry. Co. v. Littlefield*, 237 U.S. 140, 143; *Illinois Central R.R. Co. v. Mulberry Hill Coal Co.*, 238 U.S. 275, 283; *Pennsylvania R.R. Co. v. Clark Coal Co.*, 238 U.S. 456, 472.

“Applying these rulings to the case in hand, we are of opinion that a state court could entertain the action consistently with the Interstate Commerce Act. Not only does the provision in §22 make strongly for this conclusion, but a survey of the scheme of the act and of what it is intended to accomplish discloses no real support for the opposing view. With the charge of unjust discrimination eliminated, the ground upon which a recovery was sought was that for a period of four years, during which the conditions were normal, the carrier had failed upon reasonable demand to supply to a shipper in interstate commerce a sufficient number of cars to transport the output of the latter's coal mine. Assuming that the conditions were normal and the demand reasonable, it was the duty of the carrier to have furnished

the cars. *That duty arose from the common law* up to the date of the amendatory statute of 1906, known as the Hepburn Act, and thereafter from a provision in that act which, for present purposes, may be regarded *as merely adopting the common law rule*. There was evidence tending to show, and the jury found, that the conditions in the coal trade were normal and the demand for the cars reasonable. Indeed, without objection from the carrier, the court said when charging the jury: 'There is no testimony disputing the claim of the plaintiff that these were normal times.' The carrier insisted that the jury found that the carrier had a generally ample car supply for the needs of the coal traffic under normal conditions, and the jury further found that the failure to furnish the cars demanded was without justifiable excuse. Thus far it is apparent that no administrative question was involved—nothing which the act intends shall be passed upon by the Commission either to the exclusion of the courts or as a necessary condition to judicial action." (242 U.S. at pp. 123-126, italics added.)

As the above italics show, the Supreme Court in the *Sonman* case clearly held that the violation of a common law right gave a remedy to the aggrieved person in either a state or Federal Court. The *Abilene Cotton Oil* case referred to in the above quotation does not affect the principle; all it held was that §22 did not preserve such common law

remedies as were inconsistent with the Act itself and that therefore a shipper might not attack a rate, rule or practice without prior resort to the I.C.C. The *Puritan Coal* case referred to in the quotation is also exactly in point here. There the shipper complained that the carrier's own rule for car allocation in time of shortage was discriminatorily applied. The Court said:

“But if the carrier's rule, fair on its face, has been unequally applied and the suit is for damages, occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called upon to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. *Such suits though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or Federal Courts.*” (237 U.S. at pp. 131-2, italics added.)

We recognize, of course, that the Supreme Court's view, as stated in the *Sonman* and *Puritan* cases, that common law remedies reserved by Sec. 22 may be asserted in either a State or a Federal Court is dicta because the point in those cases was whether the remedies could be asserted in a state court. If those cases had been diversity of citizenship cases, it might well be urged that the Court's

dicta mean nothing because, of course, the common law remedy could be asserted in a diversity case just because it was a diversity case. However, the fact is that both cases were *non-diversity cases* as is shown by Exhibits A and B to this brief which are replicas of certified copies of plaintiff's pleadings in those cases on file in this Court. That they were non-diversity cases is made clear from an examination of Exhibits A and B. Page 26 of Exhibit A states that plaintiff and defendant are Pennsylvania corporations and page 33 of that exhibit states that defendant moved to dismiss and no answer was filed. Accordingly, non-diversity was conceded. Page 43 of Exhibit B states that plaintiff is a Pennsylvania corporation. Exhibit B does not expressly say that defendant is a Pennsylvania corporation, but page 45 of Exhibit B says that defendant is governed by the laws of that State. Moreover, Pennsylvania Railroad was defendant in both cases. Since Exhibit A is dated 1908 and alleges that defendant was a Pennsylvania corporation there is no reason to suppose that in 1909, the date of Exhibit B, it was not. Exhibit B, page 50, states that defendant moved to dismiss and no answer was filed.

The significance of the Supreme Court's saying, even by way of dicta, in a non-diversity case that

the common law remedies reserved by Sec. 22 might be asserted in a Federal Court is, we think, obvious. The Supreme Court was saying that Sec. 22 created a Federal right and that a claim under Sec. 22 accordingly presented a Federal question. No citation of authority is required for the proposition that a complaint in a Federal Court must show diversity or present a Federal question.

Powers v. Cady, 9 F. (2d) 458 (D. Ct. W.D. Louisiana, 1925), supports the view that Sec. 22 created a Federal right. That was an action for failing to furnish railroad cars. The contention was made that preliminary resort had to be made to the Interstate Commerce Commission. Relying on the *Puritan* and *Sonman* cases, the Court rejected this contention and squarely held that Sec. 22 applied. Here is a holding then, not dicta, that Sec. 22 may be asserted in a Federal Court. 9 F. (2d) at p. 462. While the citizenship of the parties does not appear in that case, it is obvious, as explained above, that had there been diverse citizenship, the Court would have had jurisdiction once it determined the matter was not for the Commission. Only in the absence of diversity does Sec. 22 become important.

The State Courts have recognized that Sec. 317(b) of the Federal Motor Carrier Act which re-

tains Sec. 22 does preserve common law rights and have enforced them. *Artic Roofings v. Travers*, 32 A. (2d) 559 (Del., 1943); *Union Transfer Co. v. Rensstrom*, 37 N.W. (2d) 383 (Neb. 1949). These cases in no way suggest that a Federal Court would not have jurisdiction.

CONCLUSION

The Court should hold either that (1) the complaint by alleging a violation of the Federal Motor Carrier Act presents a Federal question or, (2) that the Act's reservation of common law remedies presents a Federal question. The Court should then reverse the Order of Dismissal (Tr. 19-20) and remand the case to the District Court.

Respectfully submitted,

JAMES P. CRONAN, JR.,
SCHAFFER, HOLBROOK & CRONAN,
Attorneys for Appellant.

EXHIBIT A

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
PURITAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD

No. 221 May Term, 1908

PLAINTIFF'S STATEMENT

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, viz:—

First:—That the Puritan Coal Mining Company is a corporation organized and existing under the laws of Pennsylvania, and from the day of A.D. 1902, to the day of A.D. 1906, was the owner of a leasehold upon large body of bituminous coal, situate in the County of Cambria, State of Pennsylvania, and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom, to points and places within the territorial limits of Pennsylvania.

SECOND:— That the Pennsylvania Railroad Company is a corporation existing under the laws

of Pennsylvania, by an Act of Assembly approved the 13th day of March, 1946, and is by virtue of the laws and constitution of the said State, a common carrier engaged in the transportation of passengers and property, under a common control, management or arrangement for a continuous carriage of shipment from points and places within the State of Pennsylvania, to other points and places within the said State, and was and is engaged in carrying, hauling and transporting bituminous coal from points and places along its main line and branches within said State, to other points and places within said State.

THIRD:— That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially those of the Berwind-White Coal Mining Company are situate along or near the line or branch line of the defendant company in the County of Cambria, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff during the period from the 1st day of April A. D. 1902, to the 1st day of Jany, A. D. 1905, was shipped over said main line and branch of the defendant company by continuous carriage or shipment, and under the control and management of the defendant company, to points and places within the State of Pennsylvania.

FOURTH:— That the defendant company during all of the period aforesaid arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine, and publish the capacity of its mines, and did estimate, fix and determine the percentage of coal cars plaintiff was to receive each and every working day at the mines for use in the carriage and transportation of its product, and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and did so fix and determine the percentage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the product of their mines.

Fifth:— That the duty and obligation of the defendant company as a common carrier and a public highway was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the percentage of the number of coal cars to which plaintiff was entitled out of the whole number the defendant has for daily distribution; but the defendant company disregarding its duty and obligation which it owed to the plaintiff, did unduly and

unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with its pro rata share of the coal cars it had for daily distribution, and did subject the plaintiff to undue and unreasonable disadvantage and prejudice, in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars, distribute and give to said company five hundred (500) cars before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day, to which the percentage fixed by the defendant company entitled the plaintiff to receive and would have received, except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company.

Sixth:— That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, one thousand (1000) steel cars of large capacity, which it had purchased for use in the transportation of bituminous coal into interstate

mordets and places of interstate commerce to the said Berwind-White Coal Mining Company, and did by said transfer and sale deprive the plaintiff from receiving its prorata percentage of said one thousand cars for use in hulling and transporting the product of its mines, to points and places within the State of Pennsylvania.

Seventh:— That during all of said period of time, to wit, from the 1st day of April, A. D., 1902, to the 1st day of January, A. D., 1905, the plaintiff had a large and growing demand for the soft coal which it was mining and producing; that it had during all of said time constant demand and orders for its coal, in excess of the supply of coal cars furnished by the defendant company for transportation of the same to its customers, and could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, to wit, 64587 tons, which it would have sold to its customers therein at a price aggregating F. O. B. cars above costs of producing same the sum of \$49906.07 Dollars; but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That because of said undue and unreasonable discriminatory acts, the plaintiff suffered damage and loss in its business of mining

and selling its product in the markest of the soft coal trade and in points and places and to consumers of soft coal within the lines of the State of Pennsylvania and it, therefore, brings this action to recover compensation for said loss and damage in the sum of \$49936.07 Dollars. with such additional amount as will compensate plaintiff for the delay on part of the defendant Company.

KREBS LIVERWRIGHT.

Attorney

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY

vs.

PENNSYLVANIA RAILROAD COMPANY

No. 221 May T. 1908

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the original Statement of the Plaintiff, filed in this office,

IN WITNESS THEREOF, I HEREUNTO SET my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
Wm. T. HAGERTY,
Prothonotary.

SEAL

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

PURITAN COAL MINING COMPANY

against

PENNSYLVANIA RAILROAD COMPANY

No. 221 May Term, 1908

PLAINTIFF'S AMENDED STATEMENT

The Puritan Coal Mining Company files this statement of its claim and demand against the Pennsylvania Railroad Company, the defendant, and for cause of action alleges as follows, to wit:—

FIRST:— That the Puritan Coal Mining Company is a corporation organized and existing under the Laws of Pennsylvania, and from the _____ day of _____ A. D., 1902, to the _____ day of _____ A.D. 1908, was the owner of a leasehold upon the large body of bituminous coal situate in the County of Cambria, State of Pennsylvania; and was engaged in the business of mining, producing, shipping and selling bituminous coal thereon and therefrom to various points and places;

SECOND:— That the Pennsylvania Railroad Company is a corporation existing under the laws of Pennsylvania by an Act of Assembly approved the 13th day of March, 1846, and is by virtue of the laws and constitution of the said State a common

carrier engaged in the transportation of passengers and property, and was and is engaged in carrying, hauling and transporting bituminous coal; and undertook and agreed, in consideration of the franchises to it granted by the Commonwealth of Pennsylvania, to give and grant unto the plaintiff the facilities necessary for the transportation of its coal to market without discrimination in favor of other companies, corporations or individuals; and to furnish it with care and motive power without any preference to other companies, corporations or individuals; but the defendant has failed and refused to perform its duty thus imposed upon it in the manner and to the extent hereinafter narrated;

THIRD— That under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches, for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal

in the regions tributary to defendant's main line and branches; and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from bituminous coal regions tributary, as aforesaid, to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland, and Indiana and elsewhere; and to let and hire the same unto the plaintiff in this action. That the defendant company did not, as required by law, provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations, mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market, during the ordinary conditions and demands of the market for bituminous coal, the amount of coal it could and would have mined, produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and caused to be transported had it been furnished with

an adequate and sufficient supply of coal cars for such use and purpose, by reason of which failure in the performance of its duty and legal obligations, the defendant caused the plaintiff to suffer great damage, to wit:— damage in the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and $96/100$ Dollars.

FOURTH— That the mines of the plaintiff and the mines of other shippers of bituminous coal, especially of the Berwind-White Coal Mining Company, are situate along or near the line, or branch line, of the defendant company in the County of Cambria and adjoining counties, and that a large part of the coal mined and shipped from the premises controlled by the plaintiff, during the period from the 1st day of April, 1902, to the 1st. day of January, 1905, was shipped over said main line and branches of the defendant company;

FIFTH:— That the defendant company, during all of the period aforesaid, arbitrarily assumed the right to estimate and determine the capacity of the plaintiff to produce coal from its mines, and did in fact estimate, fix and determine and publish the capacity of its mines, and did estimate, fix and determine the per centage of coal cars plaintiff was to receive each and every working day at its mines for use in the carriage and transportation of its

product; and did in like manner estimate, fix and determine the producing capacity of all other mines upon its main line and branch lines, and it so fixed and determined the per centage of coal cars the said several operators and owners of mines were entitled to have and receive for the carriage and transportation of the products of their mines:

SIXTH— That the duty and obligation of the defendant company as a common carrier and a public highway, was to furnish coal cars to the plaintiff upon a basis of equality in proportion to its rated capacity to mine and produce coal, and according to the measure of duty fixed by itself in determining the per centage of the number of coal cars to which plaintiff was entitle out of the whole number that defendant had for daily distribution; but the defendant company, disregarding its duty and obligation which it owed to the plaintiff, did unduly and unreasonably, as well as unlawfully and unjustly, neglect and refuse to furnish the plaintiff with the pro rate share of coal cars which it had for daily distribution, and did subjecky the plaintiff to undue and unreasonable disadvantage and prejudice in that it favored and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, in that it did in the daily distribution of its coal cars distribute and give to

said company five hundred cars (500) before distributing to the plaintiff any cars; and did thereby unjustly and unlawfully deprive the plaintiff of the just and fair amount of cars each day which the per centage affixed by the defendant company entitled the plaintiff to receive, and which it would have received except for said unjust, undue and unreasonable discrimination in favor of said Berwind-White Coal Mining Company;

SEVENTH— That the defendant company did also unduly and unreasonably discriminate against the plaintiff and in favor of the said Berwind-White Coal Mining Company, to the prejudice and disadvantage of the plaintiff, in that the said defendant did cause to be transferred from its ownership, custody and control, to the said Berwind-White Coal Mining Company, one thousand (1000) steel cars of large capacity, which it, the defendant, had purchased for use in the transportation of bituminous coal, and did by said transfer and sale deprive the plaintiff from receiving its pro rate per centage of said one thousand cars for use in hauling and transporting the product of its mines:

EIGHTH— That during all of said period of time, from the 1st day of April, 1902, to the 1st day of January, 1905, the plaintiff had a large and

growing demand for the soft coal which it was mining and producing; and it had, during all of said time, constant demand and orders for its coal in excess of what could be moved in the supply of coal cars furnished by the defendant company for transportation of the same to plaintiff's customers, and it could and would have mined and shipped a large amount of coal in excess of what it did mine and ship, all of which it could and would have sold at a price aggregating f.o.b. cars, above the cost of producing same, the sum of Two Hundred Sixty Thousand Seven Hundred seventy-seven and 96/100 Dollars (\$260,777.96); but was prevented from so doing by reason of the aforesaid undue and unreasonable discrimination in favor of the aforesaid Berwind-White Coal Mining Company. That said sum of \$260,777.96 aggregates the reasonable profit that plaintiff could and would have made upon the coal it reasonably could and would have shipped from its mines in the following amounts, but for defendant's discriminatory acts:—

In 1902	68,501 tons
in 1903,	146,234 Tons
In 1904	83,747 Tons

and because of said undue and unreasonable discriminatory acts of defendants, hereinbefore narrated, the plaintiff suffered damage and loss in its

business of mining and selling its product, as hereinbefore set forth, and it therefore brings this action to recover from the defendant compensation for said loss and damage in the sum of \$260,777.96, with such additional amount as will compensate plaintiff for the delay on the part of the defendant company.

KREBS & LIVERWRIGHT
Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA
PURITAN COAL MINING COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 221 May T. 1908

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the Original Plaintiff's Amended Statement, filed in this office, and we further certify that issue was formed on the Defendant's Petition to dismiss for Want of Jurisdiction and that No Answer to the Amended Statement has been or was filed.

IN WITNESS THEREOF, I, HEREUNTO SET my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM. T. HAGERTY,
Prothonotary.

SEAL

EXHIBIT B

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS

PENNSYLVANIA RAILROAD CO.

No. 322 May Term, 1909

PLAINTIFF'S STATEMENT

The Sonman Shaft Coal Company, the plaintiff in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has suffered because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:—

FIRST:— That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April, 1903, and since that time to the date of the bringing of this suit.

SECOND:— That the Pennsylvania Railroad Company, the defendant, is the owner of and controls a main line and branch line of railroad extending from points and places in Cambria County, Pennsylvania, and as far west as Pittsburgh, Pa., and as far east as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a common carrier” and a public highway”, and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

THIRD:— The plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law required to furnish and provide at all times during

the ordinary conditions and demands of the bituminous coal trade, an adequate and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches for the accommodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bituminous coal from the bituminous coal regions tributary as aforesaid its main line and branches in the Counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms and corporations mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal, it could and would have mined, produced and shipped, had defendant company performed its duty

in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market to points and places within the State of Pennsylvania, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer damage, to wit, damage to the sum of Two Hundred Thousand (\$200,000) Dollars.

FOURTH:— That under and by virtue of the charter of the defendant company, as well as by the Constitution and Laws of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations mining, producing and shipping bituminous coal over its main line and branches; and especially as the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the Counties of Blair, Cambria, Clearfield, Westmoreland, and Indiana; yet disregarding its duty and legal obligations it

did, between the 1st of April, 1903, and the 1st of April, 1908, unduly and unreasonably give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporation engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially named, and against the

plaintiff. And the plaintiff further in this behalf avers that the defendant company did unduly and unreasonably discriminate against it and in favor of the Berwind-White Coal Mining Company, the Keystone Coal and Coke Company, the Columbia Coal Mining Company as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number of coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, and by the transfer of said coal cars from the defendant's ownership and control, did lessen the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to markets, and to points and places within the State of Pennsylvania, and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and the 1st of April 1908, cause great damage to be done to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand (\$200,000) Dollars.

FIFTH:— The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason of the failure of the defendant company to to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade to have the product of its mines carried and transported to the market (at points and places within the State of Pennsylvania) it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand (\$90,000) Dollars, and that subsequently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand (\$60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand (\$30,000) Dollars, which amount plaintiff claims to recover also in this action, in addition to the amount of damages set forth above arising from the undue and unreasonable discrimination of the defendant company in the distribution of coal cars.

SIXTH:— Plaintiff further avers that because of the inadequate and insufficient supply of coal cars by the defendant company for the transportation of the product of plaintiff's mines, and by reason of the undue and unreasonable discrimination on the part of the defendant in favor of other persons,

firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mine running, and to keep its organization and force of men together, and to prevent loss from the fixed charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand (\$10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as hereinbefore stated.

KREBS & LIVERIGHT,
Attys. for Plffs.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

I, WILLIAM T. HAGERTY, Prothonotary of the
Court of Common Pleas of Clearfield County, Penn-

sylvania, do hereby certify that the within is a true and correct copy of the original Plaintiff's Statement filed in the above captioned case.

IN WITNESS THEREOF, I hEREUNTO set my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM T. HAGERTY,
Prothonotary.

SEAL

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

PLAINTIFF'S AMENDED STATEMENT

The Sonman Shaft Coal Company, the plaintiff, in this action, against the Pennsylvania Railroad Company, the defendant, summoned to answer the plaintiff in a plea of trespass, files this statement of claim and seeks to recover damages which it has suffered because of the illegal and wrongful acts of the defendant, and sets forth the following statement of facts as the foundation of its right to recover, to wit:—

FIRST:— That the plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania for the purpose of mining, shipping and selling coal from its mines in Cambria County, Pennsylvania, in the open bituminous coal markets, and that it controlled by leasehold and otherwise a large amount of high grade valuable bituminous coal in the year beginning the 1st of April, 1903, and since that time to the date of the bringing of this suit.

SECOND:— That the Pennsylvania Railroad Company, the defendant, is the owner of and controls a main line and branch line of railroad extending from points and places in Cambria County, Pennsylvania, and as far West as Pittsburgh, Pa., and as far East as the Eastern territorial limits of the State of Pennsylvania, and is by its charter a “common carrier” and a “public highway”, and made such also by the Constitution and Statute Laws of the State of Pennsylvania.

THIRD:— The Plaintiff further avers in this behalf that under the Constitution and Laws of this Commonwealth, as well as at common law, the defendant company as a common carrier organized and created for that purpose and engaged in the transportation of bituminous coal, is by law re-

quired to furnish and provide at all times during the ordinary conditions and demands of the bituminous coal trade, an adequate, and sufficient supply of coal cars owned and in use by it, and to be provided by it for the transportation of bituminous coal over its main line and branches for the accomodation and use of the persons, firms and corporations engaged in mining and producing bituminous coal in the regions tributary to defendant's main line and branches, and to let and hire the same to all persons, firms and corporations engaged in mining and producing bitiuminous coal from the bituminous coal regions tributary as aforesaid to its main line and branches in the counties of Blair, Cambria, Clearfield, Westmoreland and Indiana and elsewhere, and to let and hire the same to the plaintiff in this action. That the defendant company did not as required by law provide coal cars adequate and sufficient in quantity to meet the ordinary demands of its patrons, persons, firms, and corporations mining and producing bituminous coal in the regions aforesaid, and did not furnish and provide to the plaintiff such adequate and sufficient supply of coal cars as would enable it to mine, produce and have transported to market during the ordinary conditions and demands of the market for bituminous coal, the amount of coal, it could and would have mined,

produced and shipped, had defendant company performed its duty in this respect; and that thereby the plaintiff was prevented from mining and producing and having transported to and selling in the market, a large amount of bituminous coal for which it had a demand and market, and which it could and would have mined, produced and have transported had it been furnished with an adequate and sufficient supply of coal cars for such use and purpose, and by reason of which failure in the performance of its duty and legal obligation, the defendant caused the plaintiff to suffer great damage, to wit. damage to the sum of Two Hundred Thousand Dollars, (\$200,000.00).

FOURTH:— that under and by virtue of the charter of the defendant company, as well as by the Constitution and Laws of this Commonwealth, the defendant company was in law bound and required to furnish equal and permit like facilities to all persons, firms and corporations maining, producing and shipping bituminous coal over its main line and branches, and especially was the defendant company bound in law not to make any undue or unreasonable discrimination between persons, firms and corporations engaged in mining, producing and shipping bituminous coal from the counties of Blair, Cambria, Clearfield, Westmoreland and

Indiana; yet disregarding its duty and legal obligations it did, between the 1st of April, 1903, and the 1st of April 1908, unduly and unreasonable give and grant unto other persons, firms and corporations mining and producing bituminous coal, and having the same transported over its main line and branches from the Counties aforesaid, the privileges, advantages and facilities which it denied to the plaintiff, and did unduly and unreasonably discriminate against the plaintiff in the distribution of the coal cars upon its main line and branches in use for the transportation of bituminous coal, and did unduly and unreasonably discriminate in favor of the Berwind-White Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping bituminous coal, and did by special orders during said period of time covered by this action, give and grant unto the said Berwind-White Coal Mining Company, and other persons, firms and corporations engaged in mining, producing and shipping coal, special advantages in the distribution of coal cars, and did unduly and unreasonably discriminate in favor of said Coal Companies named, and other persons, firms and corporations not especially named, and against the plaintiff. The plaintiff fur-

ther in this behalf aversthat the defendant company did unduly and unreasonably discriminate against it and in favor of the Berwin-white Coal Mining Company, the Keystone Coal & Coke Company, the Columbia Coal Mining Company, as well as other persons, firms and corporations, by causing to be transferred to said corporations a large number or coal cars from its ownership, custody and control into the custody and control of said favored shippers, thereby decreasing and diminishing its capacity to transport and carry the bituminous coal for the plaintiff over its main line and branches, any by the transfer of said coal cars from the defendant's ownership and control, did lessen the number of cars which it would otherwise have had for daily distribution to the plaintiff, and did decrease and diminish its pro rata share of coal cars, and its facilities for having its coal transported to marketm and that by said acts of discrimination as aforesaid, did during all of the period of time between the 1st of April, 1903, and the 1st of April, 1908, cause great damage to be done to and suffered by the plaintiff, to wit, damages in the sum of Two Hundred Thousand (200.000) Dollars.

FIFTH:— The plaintiff further in this behalf avers that because of the said several acts of discrimination aforesaid, as well as by reason of the

failure of the defendant company to furnish it with an adequate and sufficient supply of coal cars during the ordinary conditions and demands of the coal trade, to have the product of its mines carried and transported to the market, it was compelled to purchase and did purchase eighty (80) coal cars for the sum or price of Ninety Thousand (90,000) Dollars, and that subsequently by reason of the conduct of the defendant company, it was compelled to sell said coal cars and did sell them for the sum of Sixty Thousand (60,000) Dollars, thereby suffering loss to the extent of Thirty Thousand (30,000) Dollars, which amount plaintiff claims to recover also in this action, in addition to the amount of damages set forth above arising from the undue and unreasonable discrimination of the defendant company in the distribution of coal cars.

SIXTH:— Plaintiff further avers that because of the inadequate and insufficient supply of coal cars by the defendant company for the transportation of the product of plaintiff's mines, and by reason of the undue and unreasonable discrimination on the part of the defendant in favor of other person, firms and corporations, as hereinbefore recited, that the plaintiff company in order to keep its mines running, and to keep its organization and force of men together, and to prevent loss from the fixed

charges at said mines when the same were standing idle for want of cars to transport its coal, it was compelled to and did sell the Berwind-White Coal Mining Company, a large amount of coal at a price per ton of ten (10) cents below the ordinary contract price, and did thereby suffer a loss of Ten Thousand (10,000) Dollars, which sum plaintiff also seeks to recover in addition to the damages sought to be recovered because of the undue and unreasonable discrimination against the plaintiff in the distribution of cars as herein before stated.

KREBS & LIVERIGHT

Attorneys for Plaintiffs.

Now, September 27, 1911, the defendant objects to the proposed amendment to the third, fourth and fifth paragraphs of Plaintiff's Statement as not being authorized by the statutes of amendment and as introducing another and different cause of action and as introducing cause of action not within the jurisdiction of this Court.

MURRAY & O'LAUGHLIN

Attorneys for Defendant.

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

SONMAN SHAFT COAL COMPANY

VS.,

PENNSYLVANIA RAILROAD COMPANY

No. 322 May Term, 1909

I, WILLIAM T. HAGERTY, Prothonotary of the Court of Common Pleas of Clearfield County, do hereby certify that the within is a true and correct copy of the original Plaintiff's Amended Statement, filed in the above captioned case, and further, I do hereby certify that Issue was formed on the Defendant's Petition to Dismiss for Want of Jurisdiction and that, No Answer was filed to the Plaintiff's Amended Statement.

IN WITNESS THEREOF, I hereunto set my hand and the seal of the Court, this 27th day of May, 1953.

(s) Wm. T. Hagerty
WM T. HAGERTY,
Prothonotary.

SEAL

IN THE
United States
Court of Appeals
For the Ninth Circuit

CONSOLIDATED FREIGHTWAYS, INC., a corporation,

Appellant,

vs.

UNITED TRUCK LINES, INC., a corporation,

Appellee.

*Appeal from the District Court of the United States
for the District of Oregon*

HON. GUS J. SOLOMON, *Judge*

APPELLEE'S BRIEF

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Attorneys for Appellee.

IN THE
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IN THE
United States
Court of Appeals

For the Ninth Circuit

No. 13890

CONSOLIDATED FREIGHTWAYS, INC., a corporation,

vs.

Appellant,

UNITED TRUCK LINES, INC., a corporation,

Appellee.

*Appeal from the District Court of the United States
for the District of Oregon*

HON. GUS J. SOLOMON, *Judge*

APPELLEE'S BRIEF

STATEMENT OF THE CASE

The only question on this appeal is whether or not the District Court had jurisdiction of this action.

Appellant's Complaint affirmatively showed that there was no diversity of citizenship between the parties, but jurisdiction of the Court was sought to be invoked under 28 U.S.C.A. Sec. 1337, which provides that

"The District Court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce

or protecting trade and commerce against restraints and monopolies.” (Tr. 3-6.)

The substance of the Complaint otherwise was that appellant held a certificate from the Interstate Commerce Commission to transport cargo over U. S. Highway No. 30; that appellee did not hold such a certificate over U. S. Highway No. 30; that appellee, notwithstanding, had been transporting cargo over that highway and had diverted traffic and revenues from appellant, and the Complaint sought money damages therefor.

Appellee, by a Motion to Dismiss, challenged the jurisdiction of the Federal courts on the ground that this was a simple tort action, and that the action did not “arise” under any Act of Congress. The District Court granted appellee’s Motion and dismissed the action for want of jurisdiction (Tr. 19).

ARGUMENT

1. Argument in support of judgment.

It has been uniformly held throughout the years by the United States Supreme Court that an action is not one “arising” under the Constitution or Laws of the United States, so as to give Federal courts jurisdiction in non-diversity cases, unless the action involves a real controversy between plaintiff and defendant concerning the validity, construction or effect of some Federal law or constitutional provision.

In *Gully vs. First National Bank*, 299 U. S. 109, 81 L. ed. 70, speaking through Justice Cardozo, the Court said:

“How and when a case arises ‘under the Constitution or Laws of the United States’ has been much considered in the books. Some tests are well-established. To bring a case within the statute, a right or immunity created by the Constitution or Laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action (citing cases). The right or immunity must be such that it will be supported if the Constitution or Laws of the United States are given one construction or effect, and defeated if they receive another (citing cases). A genuine and honest controversy, not merely a possible or conjectural one, must exist with reference thereto (citing cases), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.”

In *Shulthis vs. McDougal*, 225 U. S. 561, 56 L. ed. 1205, the Court said:

“A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends.”

Other cases so holding are:

Norton vs. Whiteside, 239 U. S. 144; 60 L. ed. 186;

Western Union vs. Ann Arbor Railway, 178 U. S. 239, 44 L. ed. 1052;

South Covington Railway Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Bell vs. Hood, 327 U. S. 678, 90 L. ed. 939.

The last cited case of *Bell vs. Hood*, which is so heavily relied upon in appellant's brief, clearly reiterated this fundamental test, where the Court said:

“Thus, the right of the petitioners to recover under their complaint will be sustained if the Constitution and Laws of the United States are given one construction and will be defeated if they are given another. For this reason the District Court has jurisdiction.”

Another clearly established principle is that the existence of such a controversy between plaintiff and defendant concerning the validity, construction or effect of a Federal law must appear affirmatively from the complaint alone, by distinct factual pleadings therein.

Gully vs. First National Bank, 299 U. S. 109, 81 L. ed. 70;

Norton vs. Whiteside, 239 U. S. 144, 60 L. ed. 186;

South Covington Railway Co. vs. Newport, 259 U. S. 97, 66 L. ed. 842;

Western Union vs. Ann Arbor Railway, 178 U. S. 239, 44 L. ed. 1052.

Tested by the foregoing principles, it seems apparent that appellant's Complaint fails to state any basis for Federal jurisdiction. There is no allegation in the Complaint that the appellee claimed any right from the Interstate Commerce Commission to traverse U. S. Highway No. 30 which might make it necessary for the Court to interpret the Motor Carrier Act. For all that appears, appellee was a complete interloper, and it would seem from the Complaint that the only issue to be determined by

the Court was the amount of damages occasioned to appellant by appellee's use of the highway.

There is no allegation in the Complaint that appellant claims a right of action by virtue of any Act of Congress; on the contrary, a memorandum of authorities filed by appellant in the District Court (Tr. 7) stated:

“The substantive law of this case is bottomed upon the proposition contained in Section 710 of the Restatement of Torts (American Law Institute, Volume III, 1938):

‘Section 710. Engaging in business in violation of legislative enactment.

‘One who engages in a business or profession in violation of a legislative enactment which prohibits persons from engaging therein, either absolutely or without a prescribed permission, is subject to liability to another who is engaged in the business or profession in conformity with the enactment, if, but only if,

(a) one of the purposes of the enactment is to protect the other against unauthorized competition and

(b) the enactment does not negative such liability.’” (Tr. 7).

This suit then is simply one for damages for an ordinary tort, clearly involving no controversy as to the validity, construction or effect of the Federal laws regulating commerce or any other Federal law, and we submit that the District Court was correct in dismissing the action for want of Federal jurisdiction.

2. Argument in answer to appellant.

a. APPELLANT'S POINT I (Appellant's Brief, pp. 4 to 9).

Here appellant asserts in effect that the violation of any provision of any Federal enactment can be made the basis of Federal jurisdiction of an action for money damage for such violation.

Appellant, in support of this unusual and novel claim, relies upon the case of *Fratt vs. Robinson*, 203 Fed. (2d) 627, a recent decision of this Court. That was a suit for money damages resulting from a violation of Section 10 (b) of the Securities Exchange Act of 1934 (15 U.S.C.A. Sec. 78j (b)). This Court held in the *Fratt* case that a suit for money damages would lie for a violation of that section of the Securities Exchange Act, even though the section did not in terms provide for money damages, because the Act contemplated such a right of action. That being so, the Federal courts would clearly have exclusive jurisdiction of such a suit by virtue of Section 27 of the Securities Exchange Act of 1934 (15 U.S.C.A. 78aa), which provides:

“The District Courts of the United States * * * shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder.”

Moreover in the *Fratt* case there was a question for the Court as to the construction or effect of the Securities Exchange Act since it was necessary for

the Court to determine as an issue of law that the Securities Exchange Act, although not specifically providing therefor, contemplated a right of action for damages to one injured through a violation of Section 10 (b) of the Act. Upon the latter basis, this Court, citing and relying upon the case of *Bell vs. Hood*, 327 U. S. 678, 90 L. ed. 939, found that the District Court had jurisdiction.

In the case of *Bell vs. Hood*, 327 U. S. 678, 90 L. ed. 939, the Supreme Court determined that there was Federal jurisdiction because the plaintiffs in that case elected to claim a right of action directly flowing from a violation of rights and immunities guaranteed to them under the 4th and 5th Amendments of the United States Constitution, rather than claiming simply an ordinary trespass. Because of this unique theory advanced by the plaintiffs in the *Bell* case, the Supreme Court found Federal jurisdiction to exist, saying:

“Whether the petitioners are entitled to recover depends upon an interpretation of 28 U.S.C. Section 41 (1) and on a determination of the scope of the Fourth and Fifth Amendments’ protection from unreasonable searches and deprivations of liberty without due process of law. Thus, the right of the petitioners to recover under their Complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another. For this reason, the District Court has jurisdiction.”

In other words, in the *Bell* case a novel claim was asserted in the complaint that the plaintiffs had a cause of action directly flowing from a violation of

rights and immunities guaranteed to them under the 4th and 5th Amendments of the United States Constitution. The Supreme Court determined that there was Federal jurisdiction in that case by reason of the novelty of the claim and the fact that it would be necessary for the Court to determine whether a right to damages existed strictly based upon the violation by Federal employees of these constitutional guarantees.

Likewise in the case of *Fratt vs. Robinson*, 203 Fed. (2d) 627, no common law right of action was asserted, but rather an action purely arising out of a violation of a section of the Securities Exchange Act, an action which, although not specifically provided for, was by this Court read into the Act as a necessary counterpart to the expressed purposes of that particular Federal legislation.

Here appellant itself concedes that it is asserting a purely common law action for an alleged tort committed by appellee. How can it possibly be said here that any question of the interpretation or effect of any Federal law would be at issue? It is settled that the Federal jurisdiction must appear from the face of the complaint and nowhere in the complaint is any reliance placed upon any statutory right of action or any controversy asserted as to the interpretation or effect of any Federal law; rather it definitely appears that no Federal question could possibly be involved. We submit that appellant's Point I is without merit.

b. APPELLANT'S POINT II (Appellant's Brief, pp. 9 to 19).

If we understand appellant's argument at this point, it is that an area of Federal jurisdiction was created by that part of Section 22 of Title 49 of United States Code, which reads as follows:

"* * * and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

Just how appellant arrives at this conclusion is not at all clear to us.

The Railway Act (Title 49 U. S. Code, Part I) gave a rail carrier the right to sue for damages in Federal Court against one engaging in competition in violation of the Act (49 U.S.C.A. Sec. 8 and 9). The Motor Carrier Act (Title 49 U. S. Code, Part II) contains no such grant of Federal jurisdiction. This difference between the two Acts should be borne in mind in analyzing the railway cases cited by appellant.

Appellant cites and relies upon *Pennsylvania Railroad vs. Sonman Coal Co.*, 242 U. S. 120, 61 L. ed. 188, and *Pennsylvania Railroad Co. vs. Puritan Coal Co.*, 237 U. S. 121, 59 L. ed. 867, as authority for its contention, but all those cases decided was that the above quoted Section 22 did not abridge any rights of action which had existed to an aggrieved party prior to the passage of the Act, and that suits could be maintained in State courts in railway cases, where

a common law remedy existed, notwithstanding that the Railway Act also permitted the same suit in a Federal court.

What appellant is doing here is taking a few words out of context as authority for its contention, where it is obvious from the entire decision that the Supreme Court was not defining any new area of Federal jurisdiction. For instance, from the *Sonman Coal Company* case, appellant italicizes that the claim "may be prosecuted in either a Federal or a State court," and "may be enforced in either a Federal or a State court." However, by reading the entire surrounding text, it is perfectly obvious that the point at issue, and which the Supreme Court was deciding, was whether or not, before maintaining the suit in question, resort had to be had to the administrative procedures of the Interstate Commerce Commission, and the Court was deciding that such was not necessary under the facts of those cases. The Supreme Court doubtless, in using the quoted language, had in mind that such a suit might be prosecuted in Federal Court if one of the usual jurisdictional situations existed; diversity of citizenship or a controversy concerning the validity, construction or effect of Federal law.

In both the *Sonman Coal Company* case and the *Puritan Coal Company* case, the actions had been brought in a State court, and there was most certainly no question before the Court of the extent of Federal jurisdiction, and the Court could not possibly have intended to delineate an area of Federal jurisdiction in those cases.

In addition to the foregoing Supreme Court cases, appellant cites *Powers vs. Cady*, 9 Fed. (2d) 458, a District Court case, claiming that it holds squarely that Section 22 of Title 49 created an area of Federal jurisdiction. But no such thing is decided in that case, and an examination will reveal that the only question before the Court was whether in that case, resort should have been made by the plaintiff to the administrative procedures of the Interstate Commerce Commission before commencing suit, and the Court only held that such was not necessary in that case.

Certainly Section 22 of Title 49 preserves common law rights; certainly appellant has a common law right to damages if, as alleged, appellee was trespassing on U. S. Highway No. 30; and certainly it has a right to bring such an action in the proper State court. However, it is beyond our comprehension how it can be seriously contended that Section 22 of Title 49, where it says "and nothing in this Chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies," can of itself create a field of Federal jurisdiction, and we are unable to see where appellant finds any support for its contention in the cases cited by it.

Nowhere in the Motor Carrier Act is any special right of action created in favor of one motor carrier as against another who trespasses on its routes, and any remedy which such an aggrieved carrier might

have must be a common law right. Appellant recognized that in its memorandum of authorities to the District Court (Tr. 7). Appellant could only have a right to sue in Federal Court if by its Complaint it appeared that the case was one "arising" under any Act of Congress regulating commerce, and as we have heretofore shown, the term "arising" has always been held to require that there be a real controversy apparent from the face of the Complaint as to the validity, construction or effect of an Act of Congress.

CONCLUSION

It is our most earnest position that this case was properly dismissed by the District Court for want of Federal jurisdiction, and that the appellant must resort to the proper State court for such relief as it may be entitled to here.

Respectfully submitted,

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No. 13890

In the United States
Court of Appeals
for the Ninth Circuit

CONSOLIDATED FREIGHTWAYS, INC.,
a corporation,

Appellant,

vs.

UNITED TRUCK LINES, INC.,
a corporation,

Appellee.

PETITION FOR REHEARING
ADDRESSED TO CIRCUIT JUDGES BONE,
ORR AND CHAMBERS

Appeal from the Order of Dismissal of the District Court
of the United States for the District of Oregon
HON. GUS J. SOLOMON, Judge

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FILED

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PAUL P. O'BRIEN,

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ADDRESSED TO CIRCUIT JUDGES BONE,
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Appeal from the Order of Dismissal of the District Court
of the United States for the District of Oregon
HON. GUS J. SOLOMON, Judge

STATEMENT

The Court has decided against appellant's appeal on both grounds urged in our brief. For convenience we shall deal with the Court's Opinion of October 19, 1954, in this petition for rehearing in the same order in which the Opinion

dealt with the points raised in appellant's brief. This petition is filed and counsel's certificate is appended, all as provided in Rule 23 of this Court, effective May 27, 1953.

APPELLANT'S FIRST POINT

We believe that, in ruling adversely to appellant on its first point, the Court's opinion fell into three errors. The first was that Part II of the Interstate Commerce Act is a "* * * wholly independent legislative enactment in which Congress deliberately elected to provide no remedies for violation of any of its provisions other than those carefully spelled out in Part II itself." (Op. 4; see also, second full para. p. 7) The second error was that appellant failed to state a federal question because it relied only upon a "privilege," not upon a "right". (Op. 5-6) Finally, the Court concluded that appellant's complaint was really seeking to establish a claim of "unfair competition" and that it wasn't really relying upon appellee's violation of the Interstate Commerce Act (Op. 6).

Concerning the first error, it was not appellant's point on oral argument, as the Court says, that Secs. 8 and 9 of Part I were incorporated in Part II (Op., beginning at the bottom of p. 3). What appellant was then contending is that when Congress added Part II to the Act in 1935, it did it not by a separate piece of legislation but by *amending* the original 1887 Act. This conclusion is inescapable since Sec.

301 of 49 U.S.C.A. says that Part II amends the entire Act. In the official volume of the Federal statutes (49 Stat. 543) the amending language reads as follows:

“* * * that the Interstate Commerce Act, as amended, herein referred to as ‘Part I’, is hereby amended by inserting at the beginning thereof the caption, ‘Part I’, and by substituting for the words ‘this Act’, wherever they occur, the words ‘this part’, but such Part I may continue to be cited as the ‘Interstate Commerce Act’, and said Interstate Commerce Act is hereby further amended by adding the following Part II:”

We agree that the effect of Secs. 8 and 9 is limited to Part I (Footnote 1, p. 4). This is necessarily so because these *sections* deal with violations of that *Chapter* (1) only. Nevertheless we ask the Court to reconsider its view that Part II (Chapter 8) is separate for, if it concludes Part II is an amendment, as we think it must, then *Fratt v. Robinson* applies. In this connection, though maintaining that Part II is *separate* (first full para. p. 4, second full para. p. 7), the Court later says that Part II is an “amendment” (first full para. p. 8). If the Court becomes convinced that by amending the Act Congress intended it to be read as a whole, then it seems clear that *Fratt v. Robinson* becomes applicable. We have here, as in *Fratt*, a situation where damages may be collected for the violation of one section of the Act where the section violated provides for no rights for damages

though other sections do. Applied here that principle means that a violation of Chapter 8 permits an action for money damages because Secs. 8 and 9 permit such actions for violations of Chapter 1.

What we think is the Court's second error involves *Bell v. Hood*. That opinion states a broader principle than the *Fratt* case. It is that a complaint, seeking money damages for a violation of a federal right raises a federal question even though the right is silent as to *any* money damages for its violation. This Court disposes of the *Bell* case by saying that "rights" were involved there whereas in this case there is only a "privilege". We frankly do not see the application of this distinction. This Court correctly interprets the *Bell* opinion to mean there was a federal question because Bell claimed his "rights" had been subjected to unreasonable searches and seizures as prohibited by the Fourth and Fifth Amendments. We'll assume with the Court that appellant's certificate is a "privilege" not a "right". We submit, however, that this assumption is no reason for saying that appellant may not protect it by suing for money damages. This is the problem before the Court, and we respectfully ask the Court to consider that the problem is not solved by describing what appellant has as a "privilege". (Op. 5-6)

The Court's final error on appellant's first point is that appellant was not really basing its claim upon the federal statute. We are unable to reconcile the Court's statement

(Op. 6) “* * * still it does not clearly appear that the complaint was ‘drawn so as to claim a right to recover under the Constitution and laws of the United States’ or that appellee’s alleged violation of the Motor Carrier Act forms the ‘sole basis of the relief sought’ ”, with the Court’s summary of appellant’s complaint (1) that it “* * * charged appellee with a breach of the Interstate Commerce Act by transporting property * * *” (p. 6) and (2) “appellant held a certificate”, “that appellee did not hold a certificate” (p. 2, first para.).

Our recollection is that Judge Orr correctly suggested upon oral argument that there is no language whatever in the complaint (Tr. 3-6) urging any theory other than a violation to appellant’s damage of the certificate provisions of the Interstate Commerce Act, Part II. Despite the complaint and the Court’s summary of it, the opinion concludes that the real basis of the suit is “unfair competition” relying for this, not upon the text of the complaint but upon appellant’s memorandum to the trial court urging it was entitled to recover because appellee had engaged in business in violation of law. Appellant did not urge unfair competition either in its complaint or in its memorandum to the trial court.

The complaint and the memorandum did claim appellee had violated the Act to appellant’s damage. One does not need the violation of a statutory prohibition against doing

business without prior permission to set up a claim of unfair competition. If I palm off my inferior cigarettes as "Lucky Strikes" (the classical type of unfair competition case, see 3 Restatement of Torts Ch. 35, beginning at p. 534), the manufacturer of Luckies doesn't have to show I violated a statute. Here, had it not been for the Interstate Commerce Act, Part II, appellee could have operated over the highway in question as much as it pleased and it would not have been unfair competition for it to do so. It does not make it "unfair competition" for appellee to operate in violation of the Act. All appellant is claiming is that appellee violated the Act to its damage, not that it unfairly competed with appellant. We submit that the complaint relies solely on the violation of the Act despite the trial court's generalization that appellant was relying on the "common law" (Tr. 15), and this Court's particularization that appellant relies upon "unfair competition." Moreover, even if the memorandum had relied on the common law, the problem before the trial court and this Court would be whether the *complaint* raised a federal question, not what the memorandum said about it. *The Fair v. Kohler Die Co.*, 288 U. S. 22.

APPELLANT'S SECOND POINT

We contended in our brief, as the Court correctly points out on page 2 of the Opinion, that the Motor Carrier Act,

by reserving common law remedies, created a federal right cognizable in a district court as a federal question. In its discussion of appellant's first point, the Court identifies the particular common law remedy sought by the complaint as one based upon "unfair competition" (Op. 6). While, as we have pointed out above, we do not agree with this construction, we shall now assume that the Court is correct in characterizing appellant's cause of action as being a common law one based upon unfair competition.

In its discussion of appellant's second point, the Court seems to recognize correctly that Sec. 22 of the original Interstate Commerce Act reserving common law remedies was, in fact, carried over by Sec. 317(b) of the Motor Carrier Act to become an integral part of the Motor Carrier Act. This conclusion, which is what we think the Court meant, is necessarily correct since Sec. 317(b) of 49 U.S.C.A., quoted by the Court admits of no other possible conclusion. We want to emphasize the effect of Sec. 317(b), however, because the second paragraph of the Court's opinion on appellant's second point, that is, the paragraph beginning at the bottom of p. 7 and carrying over to the top of p. 8, stresses that Sec. 22 dealt only with carriers "*other than motor carriers*" and "*only to carriers other than motor carriers*". These italicized phrases which are the same as those the Court italicized, create some doubt in our minds as to the Court's meaning.

With this preliminary out of the way, we'll now assume that appellant seeks by its complaint to recover on a cause of action based upon unfair competition and that Sec. 22 is *in toto* a part of the Motor Carrier Act. We know that the Court believes the action is for unfair competition, and except for the italics, we feel confident that the Court agrees that Sec. 22 is a part of the Motor Carrier Act.

Even so, the Court has decided that the claim noted may not be asserted in a federal court. The first basis for this ruling is that appellant has not cited to the Court any authority applying "* * * orthodox common law remedies against the carriers covered by Chapter I of the Interstate Commerce Act in any instance where *unfair competition* between carriers in the securing of business was the basis of a demand for relief * * *" (Op. 8-9, emphasis the Court's). We must say we do not see how such a claim could ever have been litigated so far as railroads are concerned. The complaint in this action says that appellee operated over a highway it was not authorized to serve, thereby diverting business from appellant which had the right to serve the highway in question (Tr. 3-6). Since railroads, of course, have separate rights of way, it is hard to see how this situation could possibly have come up under Part I (the railroad section) of the Act.

The Court then goes on, on p. 9 of the Opinion to point out correctly that appellant attached copies of complaints

to its brief, which complaints involved actions against the Pennsylvania Railroad for refusal to furnish cars. The Court incorrectly, however, says that the “* * * outcome of the litigation in these state cases is not shown * * *” and it also incorrectly holds that “* * * Chapter I of the Interstate Commerce Act specifically prohibited the above noted practice * * *” (Op. 9). The central error of the Court’s opinion on the common law point is the last sentence in the third from the last paragraph of the Opinion and the next to last paragraph in the Opinion (p. 9). For convenience we quote this language as follows:

“Even though a common law remedy invoked in a state court might have ultimately been judicially held to be available to shippers denied sufficient coal cars, by an interstate rail carrier, it must be pointed out that the *right* to cars directly arose under federal law.

“In the case at bar, appellant concedes that no statutory right to a common law remedy for damages for alleged ‘unfair competition’ of a motor carrier is preserved, as is (and was) the *statutory right* of shippers in 1908 to have coal cars provided by a railroad common carrier.” (Emphasis the Court’s).

We can see how the Court arrived at the result it did if the assumption involved in the above quotation is correct; that is to say, if the right to cars was conferred by the Federal statute, it is easy to see that an alleged violation of those rights would give rise to a federal cause of action.

However, the principal case we relied on, together with the complaints attached to our brief, make it perfectly clear that *there was no federal statutory right to cars when the complaints were filed*. On page 14 of our brief we cited the Supreme Court in *Pennsylvania R. R. v. Sonman Coal Co.*, 242 U. S. 120, at p. 124, as follows:

“* * * a claim for damages for failing upon reasonable request to furnish to a shipper in interstate commerce a sufficient number of cars to satisfy his needs, may be enforced in either a *Federal or a State Court* * * * whether the carrier’s default was a violation of its *common law duty* existing prior to the Hepburn Act of 1906, or of the duty prescribed by that Act * * *.” (Emphasis supplied.)

Turning to page 42 of our brief which starts a replica of the complaint in the *Sonman* case, we note on page 43, paragraph “Third” that plaintiff was relying upon the *Pennsylvania law and the common law*. Nowhere does the complaint mention the Federal law. Moreover, the complaint (Br. top p. 46) specifies that the time complained of was that between April, 1903, and April, 1908. The opening words of the opinion of the Supreme Court in the *Sonman* case point out that the cause of action started in 1903 (242 U. S. 120, 121).

The original Interstate Commerce Act of February 4, 1887 (24 Stat. 379), did not place upon an interstate carrier by rail any duty to furnish cars. The act was thereafter

amended in 1889, 1891 and 1903 (25 Stat. 855, 26 Stat. 743 and 32 Stat. 847). None of these amendments required the carriers to furnish cars. The duty to furnish cars was *first placed in the law* by the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584). The duty to furnish cars was contained in the following language in the Hepburn Act:

"Sec. 1. * * * and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, * * *" (34 Stat. 584 near bottom of page).

Accordingly, the Supreme Court in the *Sonman* case was dealing *not* with a federal right to receive cars, a right which this Court incorrectly assumed existed, but with a *common law* right to receive cars. It was not, therefore, dealing with a violation of the Act. In the *Sonman* case the Supreme Court held that the common law remedies reserved by Sec. 22 might be asserted in a State Court. By way of dicta, as the above quotation from the *Sonman* case shows, it said that such common law remedies could also be asserted in a Federal Court. Moreover, these dicta appear in *non-diversity cases*, as the complaints attached to our brief show and as we pointed out in our brief (pp. 16-18).

In conclusion, on appellant's second point, it is perfectly clear that the Supreme Court of the United States has said

by way of dicta that a common law remedy may be asserted in a Federal Court in a non-diversity case where the carrier breaches any common law duty. We submit that this leaves this Court with the problem whether this plaintiff (appellant), having proceeded on a common law theory (under the Court's Opinion), may assert such a theory in a Federal Court in a non-diversity case under the clear dicta in the *Sonman* case. So far we think the Court has wrongly decided that it may not.

CONCLUSION

The order of dismissal (Tr. 19-20) should be reversed and the case should be remanded to the District Court on one of the alternatives mentioned in our brief (p. 19).

Respectfully submitted,

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Attorneys for Appellant.

I hereby certify that the foregoing petition for rehearing is in my judgment well founded and it is not interposed for delay.

JAMES P. CRONAN, JR.,

Of Attorneys for Appellant.

No. 13892

**United States Court of Appeals
FOR THE NINTH CIRCUIT**

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Southern District of California,
Central Division

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ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O. 21-27

POINT TWO

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment. 27-30

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim. 30-40

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POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case. 41-53

POINT FIVE

The trial court committed reversible error in excluding relevant and material testimony offered by appellant for the purpose of showing that he was denied a full and fair hearing by the local board upon his personal appearance contrary to the regulations. . . 53-54

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No. 13892

United States Court of Appeals
FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Southern District of California,
Central Division

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [I 42-43]¹ The district court made no specific findings of fact. These were waived. No reasons were stated by the court

¹ Numbers appearing herein within brackets preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.

in writing for the judgment rendered. The judge of the court declared orally that the motion for judgment of acquittal was denied. He made no discussion of the principles of law involved in the case. [II 271]

The trial court found the appellant guilty. [II 271] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [II 2-3] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [I 44-45]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that, after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about July 21, 1952, appellant did knowingly fail and refuse "to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Appellant was arraigned and pleaded not guilty. [I 4] He waived the right of trial by jury and the findings of fact and conclusions of law. [I 5-6]

Appellant subpoenaed the production of the secret FBI investigative report made pursuant to Section 6(j) of the act. [I 8-9] The Government moved to quash the subpoena. [I 8-9] An order to show cause was issued to show whether or not the subpoena should be quashed. [I 18] The trial court overruled the motion to quash and ordered the Government to produce the secret investigative report. [I 18] At the trial the court privately inspected the FBI report and held it to be immaterial to any issue and refused to admit the document in evidence. The court ordered the report sealed and prohibited appellant's counsel from seeing the exhibit. [I 35; II 77-78, 81, 141-142, 246-248, 249-253]

Motion for judgment of acquittal was made. [I 29-34; II 271] The motion for judgment of acquittal was denied. [I 38; II 271] A motion for new trial was filed. [I 39-40] The motion was denied. [I 41; II 274] The appellant was sentenced to serve a period of four years in the custody of the Attorney General. [I 42-43; II 277] Notice of appeal was timely filed. [I 44-45] The transcript of the record, including statement of points relied upon, has been timely filed in this Court.

THE FACTS

Appellant was born August 13, 1931. (1)² Tomlinson registered with his local board on October 18, 1949. (2, 3) A classification questionnaire was mailed to him on September 1, 1950. (3, 4)

Tomlinson properly filled out the questionnaire. He gave his name and address. (5) In Series VI he stated that he was a minister. He also said he regularly served as such and that he had been a minister of Jehovah's Witnesses since July 6, 1941. He stated that he had been formally ordained on July 6, 1941, at Millville, New Jersey. (6, 12-13)

He explained extensively about his method of preaching and teaching and about the organization that he represented. He also showed that he was ordained publicly through a formal ceremony. (12-13) He showed that, while he was engaged in secular work, his secular work was not his vocation but his ministry was his vocation. (14) He submitted a certificate of ordination. (15)

In the questionnaire he also showed that he was not married. He showed that he supported himself by secular employment as a baker. He gave Walter Boie Pies as his employer. (7-8) In Series X he showed that he had received elementary education and junior high school training. He also said he attended high school for a period of two years.

² Figures appearing in parentheses refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom and the numbers are circled.

(9) He signed the certificate at the end of questionnaire showing that he was a conscientious objector and requested the special form for conscientious objector. (10) He claimed classification as a minister in Class IV-D. (10)

He filed the special form for conscientious objector that had been mailed to him by his local board. In Series I (B) he certified that he was opposed to both combatant and noncombatant military service. (20) He showed that he believed in the Supreme Being and that this belief carried with it obligations superior to those owed to the state. He showed that Jehovah God and Christ Jesus were recognized by him as the Supreme Powers. He explained this extensively. (20, 24-25) He also showed clearly how it was and when it was that he became a conscientious objector. He showed that his parents had reared him as one of Jehovah's Witnesses and since the age of nine he had been convinced that the belief of Jehovah's Witnesses was the right way.

He showed that his primary source of his objections was the Bible and the Watchtower publications. (21) He showed that he relied on Jehovah God as the one primarily responsible for his guidance. He said that he did this through the Word of God. (21) He explained that normally he did not believe in the use of force but he did believe it was proper to defend himself and his spiritual brothers. (21, 27)

He showed that his behavior in his life had been consistent with his conscientious objections and he always strove to conform to the commandments of Jehovah, the Almighty God. (21) He stated that he had repeatedly given expression, both publicly and privately, to his friends and others about his conscientious objections. (21) He listed the names and addresses of the schools that he attended. (21) He gave the list of his employers. (21) His places of residence were listed. (22)

He gave the names of his parents and showed that their religious beliefs were those of Jehovah's Witnesses. (22)

Tomlinson showed that he had never been a member of

a military organization. (22) He showed that he was a member of the organization known as Jehovah's Witnesses. (22) He pointed out that the Watchtower Bible and Tract Society of Brooklyn, New York, was the legal governing body of Jehovah's Witnesses. He showed that he had become a member of the organization by baptism. (22, 24-25)

He gave the address of his church. (22) He showed that Shield Halvajian was the presiding minister of the congregation. (22) He described extensively in a letter his position as a conscientious objector. He showed that he was entirely neutral toward the affairs of this world. He showed that he followed in the footsteps of Jesus who commanded him to keep himself separate and apart from the world. He showed that Christ Jesus commanded him as a Christian follower not to be spotted by the affairs of this world. (22, 24-28)

He then showed that he had no relationship with any other organization of any kind or character. (22) He attached to his conscientious objector form a booklet entitled "Neutrality" and a magazine entitled "Awake!" (27) In addition to this he filed with the local board, along with the conscientious objector form, a statement by his parents, who were Jehovah's Witnesses. They certified that they had trained Tomlinson in the way that he should go since childhood. They reviewed his study at home and also the fact that he had been trained in the Theocratic Ministry School. They then pointed out that he had been duly trained for the ministry and was ordained in 1940. They showed too that since the date of his ordination he had been an active minister. They requested the board to classify Tomlinson as an ordained minister. (29-30)

Accompanying the conscientious objector form also was an affidavit signed by Shield Halvajian. (31-32) This material was received by the board and filed on September 18, 1950. (11)

On October 30, 1950, the local board classified Tomlinson in Class I-A. (11) He was notified. (11) He then wrote the

local board for a personal appearance. (32) On November 15, 1950, the local board commanded him to appear on November 17, 1950. (34) This was canceled and the date of appearance postponed. (11) Tomlinson appeared before the local board on November 20, 1950. (11)

Tomlinson attempted to testify upon his trial that he was denied his rights to discuss his classification, point out material in the file that had been overlooked and submit new and additional evidence. The trial court erroneously denied Tomlinson the right to show that he had been deprived the right of procedural due process. [II 181-192] He attempted to give testimony about the prejudice on the part of the members of the local board. This evidence was objected to and some of his testimony was stricken. [II 194-195]

The records of the local board show that the personal appearance was conducted on November 20, 1950. The memorandum shows that Tomlinson attempted to give evidence before the local board. The memorandum shows explicitly that "the local board feels that he does not qualify for such a classification, inasmuch as there has been no Theological training in a school, or background which would make him a minister. They feel that a minister is one who has a regular following, and is ordained." (35) The memorandum shows that prejudicial remarks were made by members of the local board. (35)

The local board, upon personal appearance, reopened appellant's case as required and thereafter, on reconsideration, placed him in Class I-A. This was the original classification that had been given to him on October 5, 1950. (11, 35) He was notified of this classification on November 27, 1950. (11) Tomlinson duly appealed from the classification in writing. (36)

Thereafter, he wrote a letter to the appeal board, constituting his appeal statement. In this letter he complained to the board of appeal that he had been denied his rights to procedural due process before the local board upon personal

appearance. (37, 38) He then attempted to argue and explain his conscientious objections. (38-39) He then reiterated he had been denied his right to give any evidence upon the personal appearance. (40) He attached various references from documents showing that he was a minister of religion and entitled to proper consideration by the local board. (41-46)

The local board then sent to Tomlinson a form requesting him to give evidence as to his dependence. He filled this out properly and returned it to the board. (47-49) The local board then on March 1, 1951, reviewed his case again and stated that there would be no change in his I-A classification. The note shows his case was forwarded to the board of appeal. (11) He was notified of this order. (11, 51)

The local board then ordered him to report for a pre-induction physical examination. (11, 52) He was found to be physically acceptable. (11, 53) The case was then forwarded to the board of appeal. The board of appeal then preliminarily determined that he was not entitled to classification as a conscientious objector which required that the file be forwarded to the Department of Justice for appropriate inquiry and hearing. (11) The board of appeal then forwarded the file to the Department of Justice for the procedure prescribed by the statute. (54)

There was then an investigation by the FBI before the case was referred to the hearing officer of the Department of Justice. [II 35, 37, 116-117, 132] The file was thereafter put in the hands of Nathan O. Freedman, Hearing Officer of the Department of Justice, for a hearing attended personally by the appellant. Tomlinson was commanded to appear before the hearing officer and he did appear for hearing.

The hearing officer had previously read the FBI secret investigative report. [II 51] He told Tomlinson that he had the FBI report before him. [II 58] He did not, however, show the reports to Tomlinson. [II 58] During the personal appearance he read excerpts from the FBI report that were

adverse and unfavorable to Tomlinson. [II 58-59] Whether the parts he read from the FBI report were fair and adequate was not definitely established by the hearing officer. [II 75-76] While Tomlinson made no requests for the names of the informants and did not know that there was an FBI report before the hearing officer, he did the best he could by showing his background in life as a conscientious objector. [II 99]

Tomlinson had received a notice from the hearing officer that he could request adverse and unfavorable evidence. [II 70-71]

Upon the trial the hearing officer was a witness. He said that in every case where there was adverse information he always told the registrant that he had the FBI report before him and attempted to summarize the unfavorable evidence appearing in the FBI report. [II 137]

In due course of time the hearing officer made a report to the Department of Justice. In his report he showed that Tomlinson sincerely believed that his participation in war was contrary to the laws of God. He showed that Tomlinson believed that laws of God were above the laws of man. He reviewed the Scriptural explanation made by Tomlinson that he was in the world but not a part of it. He put emphasis upon the fact that Tomlinson resisted the idea of being taken away from his preaching work, contrary to the laws of God. The hearing officer then concluded that Tomlinson was like all others of Jehovah's Witnesses. He found Tomlinson to have the same belief as all others of Jehovah's Witnesses. He did mention, however, that, like other Jehovah's Witnesses, Tomlinson believed he had the right to defend himself but he believed it was wrong to kill. (58-59)

The hearing officer then concluded that, notwithstanding the sincere objections of Tomlinson, the hearing officer felt that "he could render great assistance to our government in some other capacity." The hearing officer then recommended that Tomlinson be put into the army as a conscientious objector to combatant service and be required to

render noncombatant military service. He recommended a I-A-O classification. (58-59)

The board of appeal then classified Tomlinson on April 30, 1952, as a conscientious objector to combatant service and ordered him to be inducted into the army as a non-combatant soldier. He was placed, therefore, in Class I-A-O. (11) The local board notified Tomlinson of the appeal board classification on May 7, 1952. (11)

He filed a letter with the board requesting a stay of induction because he was appealing for further review. (60, 61-67) However, on July 1, 1952, the local board ordered the appellant to report for induction on July 18, 1952. (11, 68, 87) Tomlinson reported for induction on July 21, 1952. He refused to submit to induction. (11, 85, 86)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the government. He showed that his beliefs were not the result of political, philosophical, or sociological views but that they were based solely on the Word of God. (10, 20-25)

He attached documents to his conscientious objector papers fully showing his status. (27, 29-32)

The local board denied the conscientious objector status to Tomlinson. He was placed in Class I-A. (11) Following a hearing upon personal appearance he was again placed in Class I-A (11, 35)

On an appeal to the board of appeal his case was referred to the Department of Justice for appropriate inquiry and hearing. (54) A secret investigation was conducted by the FBI and a report thereof placed in the hands of the

hearing officer. [II 35, 37, 116-117, 132] Tomlinson was called for hearing. The hearing officer recommended that Tomlinson be classified as a conscientious objector but that he be required to render noncombatant military service in the armed forces. (58-59)

The board of appeal followed the recommendation and denied the full conscientious objector status to Tomlinson. He was placed in Class I-A-O. (11) In the motion for judgment of acquittal appellant contended that the recommendation of the Department of Justice and the classification by the board of appeal were arbitrary, capricious and based on artificial standards and that the denial of the conscientious objector status was without basis in fact. [I 31]

The motion for judgment of acquittal was denied. [I 38] In the motion for new trial complaint was made of the denial of the motion for judgment of acquittal. [I 39-40]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the recommendation of the Department of Justice and the classification given to appellant by the appeal board were arbitrary, capricious and without basis in fact.

II.

Appellant claimed classification as a minister of religion as well as classification as a conscientious objector. (6-13) He showed by evidence that he was engaged in the ministry as his vocation. (13-15) The memorandum made by the local board expressing the reasons for the denial of the ministerial claim shows that he was denied a full and fair hearing upon the ministerial claim. The memorandum stated that since Tomlinson had not attended a theological school he could not be considered a minister. (35) The local board, following the personal appearance, denied the ministerial classification on November 20, 1950. (35)

In his motion for judgment of acquittal appellant complained that he had been denied a full and fair hearing upon

his claim for classification as a minister of religion because the board applied arbitrary, capricious and artificial standards in considering his claim. [I 29-30]

In the motion for new trial complaint was made of the denial of motion for judgment of acquittal. [I 38, 39-40]

The question presented here, therefore, is whether or not upon his personal appearance appellant was denied a full and fair hearing upon his ministerial claim because the local board thought that he did not have a proper background and training for the ministry, inasmuch as he had not attended a theological seminary.

III.

The secret FBI investigative report was in the hands of the hearing officer at the time of the hearing. [II 35, 37, 116-117, 132] While Tomlinson did not make the request to be given a summary of the FBI report, either before or at the hearing, the hearing officer testified that it was always his uniform practice to make and give a summary of the adverse information appearing in the FBI report when the registrants appeared before him for a hearing. [II 137]

During the personal appearance of appellant before the hearing officer he read excerpts to Tomlinson from the FBI report that were considered by him to be adverse and unfavorable. [II 58-59] Tomlinson had no way to test whether what the hearing officer read to him was a fair and adequate summary. [II 75-76]

Complaint was made in the motion for judgment of acquittal that the failure to give all the adverse evidence to appellant that appeared in the FBI report denied appellant due process of law. [I 33] Complaint was made in the motion for new trial about the denial of the motion for judgment of acquittal. [I 38, 39-40]

The question presented, therefore, is whether appellant was denied a full and fair hearing upon the hearing before the hearing officer by not being given a full and adequate summary of the FBI report.

IV.

The conscientious objector claim of appellant was forwarded to the Department of Justice for appropriate inquiry and hearing. (54) A complete investigation was made by the FBI before the case was referred to the Department of Justice for the hearing. [II 35, 37, 116-117, 132] At the hearing the hearing officer had the secret FBI report before him and told Tomlinson that he had it. [II 58]

The hearing officer had previously read the secret FBI investigative report. [II 51] During the personal appearance he read excerpts from the FBI report that were adverse and unfavorable to Tomlinson. [II 58-59] There was no way whereby Tomlinson could determine whether a fair and adequate summary of the adverse evidence in the FBI report was being given to him. [II 75-76]

While Tomlinson did not request the hearing officer to give him a summary of the adverse information in the FBI report the hearing officer testified that in every case where there was any adverse evidence whatever appearing in the report he always made it a practice to summarize the unfavorable evidence and to give it to the registrant at the hearing. [II 137]

At the trial appellant subpoenaed the FBI report. The Government moved to quash the subpoena. The motion to quash was denied. [I 8-9, 14, 18] The FBI reports were produced for the private inspection of the court. The court ordered the FBI reports sealed as exhibits and marked for identification. [I 21; II 24-25, 26, 39, 121, 246-248, 249, 252-253]

The appellant was denied the right to use the FBI reports to determine whether the hearing officer had given a fair and adequate summary of the adverse information appearing in the FBI report.

The question presented here, therefore, is whether appellant was denied his right to have the use of the FBI report upon the trial to test and determine whether the summary made by the hearing officer was fair and adequate,

as he had a right to do and which right is guaranteed by the due process clause of the Fifth Amendment, the act and the regulations.

V.

At the trial Tomlinson attempted to give testimony for the purpose of showing that he was denied the right to a full and fair hearing upon personal appearance by the local board at the hearing when it denied him the right to discuss his classification, point out material in the file that he believed had been overlooked and submit new and additional evidence. The trial court erroneously excluded evidence on this point. [II 181-192] He also attempted to show that at the time of the personal appearance the board members were prejudiced against him because of his religion. This evidence was objected to and excluded. [II 194-195]

In his letter to the board of appeal Tomlinson complained of the draft board's denying him the right to a full and fair hearing upon personal appearance. [II 37, 38, 40]

The question presented, therefore, is whether the trial court committed reversible error in excluding relevant and material evidence offered by appellant to establish a denial of a full and fair hearing upon his personal appearance before the local board.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court erred in denying the motion for new trial.

IV.

The district court committed reversible error in refusing the appellant the right to use the secret FBI investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as required by due process of law, the act and the regulations.

V.

The district court committed reversible error in refusing appellant the right to testify about how he had been denied a full and fair hearing upon personal appearance by the local board.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U.S.C. App. § 456(j), 62 Stat. 609) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States v. Alvies*, 112 F. Supp. 618; *Annett v. United States*, 205 F. 2d 689 (10th Cir.); *United States v. Graham*, 109 F. Supp. 377 (W.D. Ky.); *United States v. Pekariski*, — F. 2d — (2d Cir. Oct. 23, 1953).

POINT TWO

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The undisputed evidence showed that Tomlinson claimed classification as a minister of religion. This claim was in addition to his claim for classification as a conscientious objector.

It appeared that the board in considering the ministerial claim upon personal appearance did not follow the law or the regulations. It illegally imported into the law a false element or factor. The reliance upon this illegal basis as to what constitutes a minister of religion caused the board to disregard the law completely. It determined the ministerial claim for exemption upon irrelevant and immaterial standards. The board thus manufactured its own definition of a minister of religion and rejected the law. So doing it deprived appellant of the right to full and fair hearing.

It has been held that where local boards upon personal appearance failed to consider the ministerial claim of the registrant because of the fact that he did not attend a theological seminary or was not trained in the same manner as the orthodox ministers are trained the registrant has been deprived of a full and fair hearing upon personal appearance.—See *Niznik v. United States*, 184 F. 2d 972 (6th Cir.); *United States v. Kose*, 106 F. Supp. 433 (D. Conn. May 21, 1951).

The local board, therefore, denied appellant a full and fair hearing upon his claim for classification as a minister of religion. That the local board and the board of appeal may have properly denied the claim for exemption is immaterial. The question here is not one of classification or

whether the classification actually given was arbitrary, capricious and without basis in fact. The contention here is not that the ministerial claim was denied without basis in fact. It is that appellant has been denied his rights to a full and fair hearing upon his personal appearance.

The fact that the board of appeal reclassified appellant *de novo* is of no moment.—See *United States v. Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.); *United States v. Romano*, 103 F. Supp. 597, 600 (S. D. N. Y., March 12, 1952); *United States v. Zieber*, 161 F. 2d 90, 93 (3d Cir.); *Davis v. United States*, 199 F. 2d 689 (6th Cir.); *Bejelis v. United States*, 206 F. 2d 354 (6th Cir.).

It is respectfully submitted, therefore, that the court below should have sustained the motion for judgment of acquittal on this ground.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

Section 6(j) of the act (50 U. S. C. App. § 456(j) 62 Stat. 609) provides for the hearing in the Department of Justice. *United States v. Nugent*, 346 U. S. 1, specifically held that, while the registrant was not entitled to be given the secret FBI investigative report, it was the duty of the Department of Justice to supply to the registrant a full and fair résumé of the secret report. This was not done by the hearing officer at the hearing in the Department of Justice.

Tomlinson did not ask for the summary of the FBI report, since it was unnecessary for him to do so. The Department of Justice has amended its regulations and now requires that a full and complete summary of the entire FBI report be given to the registrant at the hearing, re-

ardless of whether he requests it or not. This amendment of the regulations of the department and the change in practice is a confession of the department that before the *Nugent* decision it was unnecessary for the registrant to request a summary.

Even if the Court should conclude that it is necessary for a registrant to request a summary of the FBI report, appellant is nevertheless in position to claim that in this case it be produced. Nevertheless, in this case the appellant is in position to complain of the failure to make a full and fair résumé of the FBI report.

The hearing officer undertook to make a summary, despite the fact that appellant did not request it. His making a partial summary waived the requirement that Tomlinson request the adverse evidence. Since he undertook to make a summary of the FBI report it was his responsibility to make a full report.

The recommendation of the hearing officer to the Department of Justice was adverse. He advised the Department of Justice to recommend against the conscientious objector claim by Tomlinson. He suggested that Tomlinson be placed in a I-A-O classification. This classification denied the full conscientious objector status. It made Tomlinson liable for the performance of noncombatant service. Since the hearing officer recommended against the full conscientious objector claim it must be assumed that he relied on adverse and unfavorable evidence appearing in the file.

It was necessary, therefore, to make a full and fair résumé of the adverse evidence appearing in the secret FBI report.—*United States v. Nugent*, 346 U. S. 1; *United States v. Evans*, District of Connecticut, August 20, 1953 (opinion by Hincks, Chief Judge).

The court below should have sustained the motion for judgment of acquittal on this ground. Error was committed when the motion was denied.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial judge committed grievous error when he refused to permit the exhibits to be used as evidence. He merely received the exhibits and permitted them to be marked for identification and inspected them himself. He excluded them and permitted the exhibits to come before this Court in sealed form for the limited purpose of determining whether he was in error in excluding the exhibits.

The claim of privilege is applicable here. The Government waived its rights under the Order of the Attorney General, No. 3229, when it chose to prosecute appellant in this case. The FBI reports were found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States v. Andolschek*, 142 F. 2d 503 (2d Cir.); *United States v. Krulewitch*, 145 F. 2d 87 (2d Cir.); *United States v. Beekman*, 155 F. 2d 580 (2d Cir.); *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as

the king did before the Stuart judges in England.—*Bank Line v. United States*, 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard his judicial function in determining whether a full and adequate summary had been made of the secret investigative reports without receiving the secret reports into evidence and comparing them with the summary made by the hearing officer.—*United States v. Nugent*, 346 U. S. 1; *United States v. Evans*, District of Connecticut, decided by Judge Hincks August 20, 1953.

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of them upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

POINT FIVE

The trial court committed reversible error in excluding relevant and material testimony offered by appellant for the purpose of showing that he was denied a full and fair hearing by the local board upon his personal appearance contrary to the regulations.

Tomlinson attempted to give evidence to show that he was denied the right to discuss his classification, point out material in the file that he believed had been overlooked by the board and submit new and additional evidence. This testimony was excluded by the trial court on the theory that nothing could be added to the file.

The trial judge erroneously overlooked the fact that this was an oral hearing. He assumed illegally that a memorandum and summary of the draft board constituted a full and complete record of everything that took place upon the personal appearance, contrary to the decision of this Court in *Dickinson v. United States*, 203 F. 2d 336 (March 9, 1953).

It is relevant to give oral evidence as to what took place upon the personal appearance. (*United States v.*

Zieber, 161 F. 2d 90, 93 (3d Cir.)) Appellant was entitled to show that he was denied a full and fair hearing upon his personal appearance by the local board. The decisions to this effect are legion; it is sufficient to cite only two: *Davis v. United States*, 199 F. 2d 689 (6th Cir.); *Bejelis v. United States*, 206 F. 2d 354 (6th Cir.).

It is plain, therefore, that the trial court committed a grievous error in excluding this very vital and material evidence. The judgment of the court below should be reversed for this error alone, in event the Court does not conclude to reverse and order the district court to enter a judgment of acquittal.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j)), provides, in part, as follows:

“Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.”

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

“In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously

opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.”

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his “relation to a Supreme Being involving duties superior to those arising from any human relation.” This material also showed that his belief was not based on “political, sociological, or philosophical views or a merely personal code,” but that it was based upon his religious training and belief as one of Jehovah’s Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant’s proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscientious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up and produced it to the hearing officer to be used against the appellant. The summary supported the appellant’s claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably es-

tablish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

A decision directly in point supporting the proposition made in this case, that the I-A-O classification (conscientious objector willing to perform noncombatant military service) and the determination of the appeal board denying the I-O classification (full conscientious objector) are arbitrary and capricious is *United States v. Relyea*, No. 20543, United States District Court for the Northern District of Ohio, Eastern Division, decided May 18, 1952. In that case the district court sustained the motion for judgment of acquittal saying, among other things, as follows:

"I think it would have been more difficult for the court to find the act of the Board was without any basis in fact if the Board had classified this man as I-A rather than I-A-O. They accepted the defendant's profession of sincere and conscientious objections on the religious grounds as being truthful, but they attempted, and in my opinion without any basis in fact, to assert that while he was sincere and conscientious, that sincerity and conscientiousness extended only to his active aggressive participation in military service and that he was not sincere in his statements that he was opposed to war in all its forms."

This was an oral opinion which is unreported. A printed

copy of the stenographer's transcript of the decision rendered by Judge McNamee will be handed up at the oral argument.

A similar holding was made by United States District Judge Murray in *United States v. Goddard*, No. 3616, District of Montana, Butte Division, June 26, 1952. The court, among other things, said:

“ . . . after due consideration, the Court finds that the evidence is insufficient to sustain a conviction for the reason that there is no basis in fact disclosed by the Selective Service file of defendant upon which Local Board No. 1 of Ravalli County, Montana, could have classified said defendant in Class I-A-O, and therefore the said Board was without jurisdiction to make such classification of defendant and to order defendant to report for induction under such classification.”

The above decision was a part of a judgment. No opinion was written. A printed copy of the judgment accompanies this brief.

This case is distinguished from the facts in *Head v. United States*, 199 F. 2d 337 (10th Cir.), where the I-A-O classification was held to be proper. In that case the facts showed that the registrant was a member of a church that believed it was right to perform noncombatant military service and that the I-A-O classification was satisfactory. Also facts were present in the *Head* case that impeached the good faith conscientious objections of the registrant. Here the undisputed evidence showed that the religious group that Tomlinson belonged to were opposed to both combatant and noncombatant military service and that the I-A-O classification was not satisfactory. Tomlinson was not impeached in his good faith.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do noncombatant military service. All of his papers and every document sup-

plied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was a conscientious objector who was willing to perform non-combatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to do noncombatant military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The appeal board makes no explanation whatever of its reasons for rejecting the claim that appellant be placed in Class I-O as a conscientious objector to participation in both combatant and noncombatant military service. Certainly if there were anything in the file to indicate that appellant was willing to do noncombatant military service, the hearing officer and the Department of Justice would have found it and relied upon it.

The appeal board, without any grounds whatever, compromised appellant's claim for total conscientious objection and awarded him only partial conscientious objector status. This was directly contradictory to the testimony that appellant had given to the local board after the case was returned to the local board by the appeal board for further investigation. Appellant explicitly stated in his papers, as well as upon the special examination by the local board for the appeal board, that he would not even perform civilian work and that he objected to going into the army. He even stated that he would not serve as a chaplain in the armed forces.

It was arbitrary for the appeal board to grant only part of appellant's claim and his testimony and reject the balance. The board of appeal classified appellant as one who was willing to serve in the armed forces and perform non-combatant service. This finding flies directly in the teeth of the evidence and the sworn written statements submitted by the appellant.

The appeal board should have accepted the appellant's claim for exemption as a total conscientious objector or rejected completely his claim to be a conscientious objector. The appeal board had no authority to compromise his claim. Either he was telling the truth and was entitled to a I-O classification or else he was telling a lie and deserved a I-A classification. If the appeal board demurred to his evidence and the report of the hearing officer, it accepted the facts and made a determination that was without any basis in fact, arbitrary and capricious.

In this case the undisputed file showed that the appellant believed in the Supreme Being, that his religious duties were higher than those owed to the state, that he opposed participation in war because of them and that they were not the result of political, sociological or philosophical training but were religious beliefs. This brought the appellant clearly within the definition of a conscientious objector appearing in the act and the regulations.

There are many other grounds why the denial of the conscientious objector status is arbitrary, capricious and without basis in fact. These are argued extensively under Question One in the brief for appellant filed in *White v. United States*, No. 13,893, the companion case to this one, at pages 10-11, 14-33. Reference is here made to that argument as though copied at length herein. It is proper to make this reference because the two cases are heard here consecutively. They were tried by the same judge. They were tried consecutively. They appealed together. It is proper, therefore, to consider here the argument made in that case since the facts are identical to the facts in this case.

The position of the appellant on this point is eloquently argued by the opinion in *United States v. Alvies*, 112 F. Supp. 618 (N. D. Cal. May 28, 1953). Reference is made to the entire opinion. See also *United States v. Pekariski*, — F. 2d — (2d Cir. October 23, 1953); *Annett v. United States*, 205 F. 2d 689 (10th Cir.); *United States v. Graham*, 109 F. Supp. 377 (W. D. Ky.); *United States v. Konides*, Criminal

No. 6216, United States District Court, District of New Hampshire, March 12, 1952; *United States v. Konides*, Criminal No. 6264, United States District Court, District of New Hampshire, June 23, 1953, Honorable Peter Woodbury, Circuit Judge, sitting as district judge by special designation. Copies of these unreported decisions accompany this brief.

It is respectfully submitted that the denial of the conscientious objector claim is without basis in fact, arbitrary and capricious.

POINT TWO

The local board, upon personal appearance, deprived appellant of a full and fair hearing when it rejected the law and the regulations and decided that a registrant could not make the claim as a minister of religion exempt from training and service unless he had attended a theological school, which was in violation of appellant's rights guaranteed by the regulations, the act, and the Fifth Amendment.

The memorandum made by the local board showed the reason why the local board, upon personal appearance, refused to listen to Tomlinson or consider his claim for classification as a minister of religion. The memorandum shows that Tomlinson was denied a full and fair hearing before the board. The board had reached the conclusion that a registrant was required by law to attend a theological seminary before he was eligible to be classified as a minister of religion. As a result of this the evidence offered by Tomlinson upon the personal appearance was rejected.

In his papers Tomlinson had shown that he had satisfactorily pursued the course of study prescribed by Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. He showed that he had completed the training for the ministry prescribed by the organization of Jehovah's Witnesses. He showed in his papers that he was a minister.

The law did not require that he go to a theological school or attend a divinity school. His attendance at the Watchtower school was sufficient. He showed that he had a knowledge of the Bible and was apt to teach and preach as a minister. The organization permitted him to teach and preach as a minister. This was an ecclesiastical determination as to his schooling and qualifications. This determination could not be questioned by the board or by the courts.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

“Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle.”—86 Cong. Rec. 10589-10590.

There is nothing in the terms of the act or the regulations that authorizes the local board to prescribe that registrants must attend theological seminaries or divinity

schools before they can be considered to be ministers. The above quotation by Senator Tom Connally on the floor of the Senate indicates that Congress intended that the schooling and background of ministers of religion should not be inquired into by the members of the draft boards.

To permit the draft boards to pry into the schooling of ministers and compare the schooling of one with that of another would allow the draft boards to set themselves up as religious hierarchies. It would permit discrimination among the various religions and between different ministers registered with the local board. Freedom of religion and the spirit of toleration in this country completely forbid such a view.

The hearing given by the local board to the appellant upon his personal appearance did not meet the requirements of the law. The local board did not comply with Section 1622.1 of the regulations. (32 C. F. R. 1622.1(d)) This regulation provides:

“(d) In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each such registrant shall receive equal justice.”

It has been held that whenever a draft board inquires into and considers the religious training and background of the registrant the regulations are violated. These courts have held that when draft boards hold that it is necessary for a registrant to attend a theological seminary or divinity school as a prerequisite to claiming the exemption as a minister of religion there is a denial of a full and fair hearing upon the personal appearance.—*Niznik v. United States*, 184 F. 2d 972 (6th Cir.) ; *United States v. Kose*, 106 F. Supp. 433 (D. Conn. May 21, 1951).

It is respectfully submitted that the local board, upon the occasion of the personal appearance in this case, de-

prived Tomlinson of his right to a full and fair hearing. Due process of law was denied. For this reason it was the duty of the court below to grant the motion for judgment of acquittal. The order overruling the motion and the judgment of conviction, therefore, constitute reversible error.

POINT THREE

Appellant was denied a full and fair hearing upon his personal appearance before the hearing officer in the Department of Justice when that officer failed and refused to give to appellant a full and fair summary of the secret FBI investigative report on the *bona fides* of appellant's conscientious objector claim.

The record in this case shows that Tomlinson did not voluntarily request the hearing officer to supply any adverse evidence. The undisputed evidence shows, however, that the hearing officer undertook to make a full and fair résumé of the adverse evidence appearing in the report. It cannot be contended, therefore, that appellant was not entitled to a full and fair résumé of the adverse evidence because he did not request it. He did not waive the right to have the full and fair résumé. The reason is that the hearing officer waived the requirement that he request the unfavorable evidence specifically at the hearing.

Since the hearing officer undertook to give a full and fair résumé voluntarily he assumed the responsibility of giving that type of summary required by the Supreme Court in *United States v. Nugent*, 346 U. S. 1.

Appellant did not ask for the entire FBI report. It is true that he did not use the word "résumé" or the word "summary." He asked that he be supplied the unfavorable or adverse evidence or be given the general nature of it. He wanted to know all the evidence that was unfavorable against him. The fact that he may not have used the word "résumé" or "summary" was not enough to defeat his rights to be confronted with the unfavorable evidence. He asked

for all the regulations and the Department of Justice would allow at the time.

The Government may place stress upon the fact that the appellant in this case did not request that he be supplied a summary of the FBI report. To begin with, the Department of Justice procedure forbade the production of any such summary. There was no provision in the Department of Justice regulations for giving a summary. The procedure providing the summary of the FBI report was not established by the Government until on or about September 1, 1953. This was the first time there ever was any procedure authorizing a registrant to get a summary of the FBI report. Since it was impossible for the registrant to obtain a summary of the FBI report from the hearing officer and, inasmuch as the Department of Justice regulations prohibited the giving of such summary at the time this case was heard by the hearing officer, the argument of the Government (that the appellant failed to request a summary) should be rejected.

It should be remembered that the Supreme Court held in the *Nugent* case that the registrant was entitled to a summary of the FBI report. The notice sent out to registrants stated they could get the general nature of the unfavorable evidence. Since the notice did not give them the right to have a summary of the evidence (which the *Nugent* case held they were entitled to), failure to comply with the notice sent was not a waiver of the right to insist on the subpoena duces tecum in the court below.

Regardless of whether the request was made (for the summary of the unfavorable evidence) it is still the duty of the hearing officer to give the registrant a summary on his own motion. That is positively required now by the regulations of the Department of Justice. The recent amendment to the regulations (requiring a summary of the FBI report to be made for the registrant) is a concession by the Department of Justice that the procedure which it followed before the *Nugent* decision and in this case does not

meet the requirement of due process of law and Section 6(j) of the act.

In *United States v. Bouziden*, 108 F. Supp. 395 (D. C. W. D. Oklahoma November 13, 1952), it was held that the registrant was entitled to have a summary of the FBI report produced at the hearing. The court held, however, that the failure of the hearing officer to call the registrant's attention to the substance of the adverse evidence constituted a deprivation of the rights of the registrant. It was said:

“As directed by the statute the Department of Justice made an appropriate inquiry. Then the hearing was held with the registrant for the purpose of determining the character and good faith of the objections of the registrant to his classification. The undisputed evidence is that no mention was ever made by the hearing officer of the unfavorable information contained in the Federal Bureau of Investigation report. No opportunity was given to rebut this unfavorable information. . . .

“ . . . The hearing officer must not be permitted to withhold unfavorable information gained during the inquiry, and giving no opportunity to rebut at the hearing, *then use this same unfavorable information as a basis for his adverse advisory recommendation*. If this is done the hearing itself becomes a sham and a farce. Why hold a hearing to determine a fact if there is a predetermination of the fact and no intent to discuss the basis of the predetermination?”

The court in *United States v. Bouziden*, 108 F. Supp. 395 (W. D. Okla. 1952), distinguished the decision in *Imboden v. United States*, 194 F. 2d 508 (6th Cir.), certiorari denied 343 U. S. 957, on the ground that the hearing officer provided the registrant in that case with the substance of the unfavorable evidence and that no complaint was made

about the failure to answer but that the contention was made that he did not give the names of the informants to the registrant.—Compare *United States v. Annett*, 108 F. Supp. 400 (W. D. Okla. 1952); reversed on other grounds, 205 F. 2d 689 (10th Cir.) June 26, 1953.

In *Eagles v. Samuels*, 329 U. S. 304, the Supreme Court approved the use of the theological panel. The panel made a report which was made a part of the file. It was available to the registrant. It was not withheld to the injury of the registrant as here. The Court, speaking through Mr. Justice Douglas, held that even the information that was received by the special panel and given to the local board, in order to afford due process, had to "be put in writing in the file so that the registrant may examine it, explain or correct it, or deny it. There is, moreover, no confidential information that can be kept from the registrant under the regulations."—(329 U. S., at p. 313). See also *Degraw v. Toon*, 151 F. 2d 778 (2d Cir.); *Levy v. Cain*, 149 F. 2d 338 (2d Cir.); *United States v. Balogh*, 157 F. 2d 939 (2d Cir.); judgment vacated, 329 U. S. 692; affirmed on other grounds, 160 F. 2d 999.

This Court has long ago held that a person appearing before an administrative agency is entitled to be informed of any adverse evidence that may be used against him. *Chen Hoy Quong v. White*, 249 F. 869 (9th Cir. 1918), is one of the first cases decided by this Court on this point. In that case the Court held that the failure to disclose a secret and confidential communication relied on by an immigration hearing officer violated the procedural rights to due process of law. This Court set aside an order denying an alien admission to the United States on the grounds that he was not given a full and fair hearing.—See also *Bachus v. Owe Sam Goon*, 235 F. 847, 853; *Chin Ah Yoke v. White*, 244 F. 940, 942; *Mita v. Bonham*, 25 F. 2d 11, 12 (9th Cir.); *Ohara v. Berkshire*, 76 F. 2d 204, 207 (9th Cir.).

Even where the facts are actually known to the hearing officer (which is not the case here) the administrator cannot

base his decision or recommendation upon it.—*Baltimore & Ohio R. Co. v. United States*, 264 U. S. 258 (permitting a railroad to acquire terminal roads); *Southern R. Co. v. Virginia*, 290 U. S. 190, 198; *Market St. Ry. v. R. Comm'n of California*, 324 U. S. 548, 562.

In *Degraw v. Toon*, 151 F. 2d 778 (2d Cir.), a draft board order was held to violate due process. The board considered evidence that damaged the registrant. It was a letter from two members of the advisory board. The court held that the opportunity to know and rebut damaging evidence goes to the heart of the controversy.—See also *United States v. Kowal*, 45 F. Supp. 301 (D. Del.).

It is unnecessary for the administrative agency to accord a judicial trial as a part of due process. (*United States v. Ju Toy*, 198 U. S. 253, 263) It is necessary that the procedural steps be otherwise in accordance with the requirements of the Fifth Amendment guaranteeing notice and the right to defend or answer a charge. (*Interstate Commerce Commission v. Louisville and Nashville Railroad Company*, 227 U. S. 88, 91-92.) The Supreme Court has held that where a statute provides for an administrative hearing the due-process clause of the Fifth Amendment requires a full and fair hearing in the sense of the traditional hearing.—*Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 182.

It has been held that procedural due process requires that where the facts contained in a secret report are relied on by the administrative agency it must be produced and made available at the trial.

“If that were not so a complainant would be helpless for the inference would always be possible that the court and the Commission had drawn upon undisclosed sources of information unavailable to others. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.”—Mr. Justice Cardozo in *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U. S. 63, 68, 69.

Another important case on this subject is *Morgan v. United States*, 304 U. S. 1. That case presented a question on the validity of an order of the Secretary of Agriculture. He fixed maximum rates charged by market agencies under the Packers and Stockyards Act. (7 U. S. C. §§ 181-229) The Court held that a fair hearing commanded an "opportunity to know the claims of the opposing party and to meet them." Chief Justice Hughes added that the party was entitled to be "fairly advised" and "to be heard" upon the issues. He said that administrative agencies must guarantee "basic concepts of fair play."—304 U. S., at pages 18, 22. See also *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U. S. 329, 335-336.

In *Kwock Jan Fat v. White*, 253 U. S. 454, it was held that the suppression or omission of evidence did not allow a fair hearing. It was pointed out that everything relied upon in the administrative determination must be included in the record.—253 U. S., at 464.

In *United States v. Abilene & S. Ry. Co.*, 365 U. S. 274, 290, it was held that a party before an administrative agency must be apprised of all evidence submitted and made a part of the determination.—See also *Interstate Commerce Comm'n v. Louisville & N. R. Co.*, 227 U. S. 88, 93.

The act and regulations make the recommendations of the Department of Justice to the appeal board merely advisory. They may be rejected by the appeal board. The appeal board may classify a registrant as liable for training and service in the armed forces when the Department of Justice recommends that he be classified as a conscientious objector, or vice versa. The Government argues that, because of this advisory nature of the recommendation, the Department of Justice can successfully refuse to give the registrant due process of law. The Government argues that it is not bound to place all the evidence in the file as the draft board is required to do, purely because the report is advisory in nature.

It is true that the investigation and recommendation of

the Department of Justice are merely advisory. This does not make the use of the illegal FBI report and the non-disclosure of the names of the informants harmless error. The report was relied on. Were it not for the adverse testimony of anonymous witnesses the claim for conscientious objector classification would not have been denied.

It cannot be said that it is harmless error when the rights of the registrant here were denied by the use of the FBI report by the hearing officer and the appeal board.

The FBI report was embraced, accepted and adopted by the appeal board. The unconstitutional procedure of the Department of Justice was adopted as the unconstitutional procedure of the Selective Service System. The appeal board made the invalid proceedings its own. Since the order to report is based on proceedings had before the Department of Justice, the use of the report by the draft boards vitiated the entire proceedings.

It is harmless if the report of the department is against the registrant and the appeal board grants the conscientious objector status. But when the appeal board accepts the recommendation to deny the status claimed by the registrant an entirely different situation is presented. The hearing officer has and relies on the report of the FBI. The Attorney General, making the recommendation to the appeal board, relies on the report of the hearing officer which is based on the FBI report. The Attorney General also has before him in making the recommendation the FBI report. He tests the report of the hearing officer with it. His recommendation is based not only on the report of the hearing officer, but also on the FBI secret police report. The board of appeal in more than ninety cases out of a hundred relies on the recommendation of the Department of Justice especially when the recommendation is adverse. In this case the board of appeal accepted and adopted the recommendation of the Department of Justice based mainly on the FBI report.

It is then only proper, necessary, fair, constitutional

and in compliance with due process of law that the summary of the adverse evidence gathered and recorded by the Federal Bureau of Investigation be given to appellant. It was relied on by the hearing officer. The hearing officer's report was relied on by the Department of Justice in making its recommendation to the appeal board and the appeal board relied on the recommendation supported by the FBI report. By all principles of fairness this evidence ought to be made available to the registrant on his trial. Without being provided the summary of the FBI report the registrant is denied the right to show that there is no basis in fact for the determination made by the appeal board based on the recommendations made by the Department of Justice and the hearing officer on the conscientious objector claim of the registrant.—*Estep v. United States*, 327 U. S. 114; *Kwock Jan Fat v. White*, 253 U. S. 454.

The error and harm produced by not giving a summary of the FBI report can be demonstrated by an analogy. There are certain types of judicial proceedings where the jury verdict is merely advisory. If misconduct of counsel, the jury or the court in violation of constitutional rights occurs in a trial where the verdict is merely advisory, it certainly would be ground for a new trial and reversal on appeal if the unconstitutional proceedings before the jury resulted in the verdict which was accepted by the trial court. This is what happened here. The adverse verdict against the registrant was accepted by the appeal board. The unconstitutional trial before the hearing officer invalidated the proceedings before the appeal board when the Department of Justice recommendation, adopting the hearing officer's report, was followed by the appeal board.

Suppose an attorney, during a trial before a jury in a case where the verdict was advisory, handed to the jury an exhibit that had been excluded from evidence. Also assume that the adversary did not learn of this until after entry of judgment. Putting aside the liability of the attorney for contempt of court, would it be doubted that the

verdict and judgment would be set aside even if the verdict were advisory? The same situation exists here.

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States v. Romano*, 103 F. Supp. 597 (S. D. N. Y. 1952)) The absence of the summary of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire selective service chain useless, void and of no force and effect. The Supreme Court held in *Kessler v. Strecker*, 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of Justice which has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal, notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States v. Everngam*, 102 F. Supp. 128 (D. W. Va. 1951). In that case the court said:

"Under these statutory provisions, the hearing, report, and recommendation of the Department of Justice is an important and integral part of the conscription process for the protection of both the government and the registrant. The defendant had the right to have a fair hearing and a non-arbitrary report and recommendation by the Department of Justice to the appeal board.

“It does not appear that any member of the appeal board felt himself bound by this report and recommendation or how far, if at all, it influenced the decision of the appeal board, but that is not enough. The report and recommendation was transmitted to the appeal board to use as an advisory opinion, and was considered and used (as the regulations require) by the appeal board in its subsequent classification of the defendant.”

This quotation was made and approved in *United States v. Bouziden*, 108 F. Supp. 395 (D. W. D. Okla. 1952). It is respectfully submitted that the fact that the act and regulations make the recommendation advisory does not prevent the broken link from ruining the required continuously legal chain.

The making of the report and recommendation by the Department of Justice to the appeal board is after the hearing in the Department of Justice which the registrant attends. Appellant had no opportunity to see the report and recommendation of the Department of Justice until after his conscientious objector claim had been denied by the appeal board. The report and recommendation is sent directly to the appeal board. The registrant never sees this report before the appeal board determination. He has no opportunity to answer the report before the final determination by the appeal board. The making of the report and recommendation to the appeal board, wherein reference is made to the FBI report, does not make the report as available to the registrant as to the appeal board. The appellant was entitled to have this notice sent to him before the final determination by the appeal board. It is therefore erroneous for the Government to argue that the adverse evidence in the FBI report was made available to the appellant. It was not made available until it was entirely too late for him to do anything about the appeal board determination.

The appellant had the right to see his file after the ap-

peal board finished with and returned its denial of his conscientious objector claims. But this was entirely too late because there was no chance for the appellant to get the appeal board to reconsider his classification.

A speculative argument is made by the Government. It is said that the appeal board acted only on the adverse evidence of the FBI report which is referred to in the report and recommendation of the Department of Justice. The report and recommendation of the Department of Justice to the appeal board never attempts to summarize the FBI report. It merely refers to the FBI report without specifying what part of the report the Department of Justice relies upon. The fact that the appeal board follows the Department of Justice recommendation and denies the conscientious objector status requires the court to speculate as to just what the appeal board did rely upon. Speculation may not be indulged in by the court in a criminal case.—*United States v. Alvies*, 112 F. Supp. 618, at page 624; *Estep v. United States*, 327 U. S. 114, at pages 121-122.

It is presumed that the appeal board relied on the report and recommendation of the Department of Justice. Since the Department of Justice relies on the entire FBI report, it is necessary to conclude that the appeal board, therefore, is forced to rely on the entire report without seeing it since it adopts the report and recommendation of the Department of Justice.

It is respectfully submitted that the failure on the part of the hearing officer to give a full and fair résumé and summary of the adverse evidence appearing in the FBI report denied appellant due process of law. The denial of the full and fair hearing destroyed the validity of the draft board proceedings. The motion for judgment of acquittal should have been granted. The overruling of the motion and the conviction of the court below constitutes reversible error.

POINT FOUR

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The secret reports of the FBI made in the investigation of the conscientious objector claim of appellant were subpoenaed. Upon the trial they were offered in evidence by the appellant. The trial court excluded the documents and forbade them to be received into evidence. It ordered them sealed and marked for identification so that the bill of exception on the ruling denying admission of the documents into evidence could be preserved for this Court. The appellant moved to inspect the documents and requested the court to receive them as evidence on several occasions. This request was denied every time that it was made. The trial court found the documents to be material. It refused to allow them to go into evidence because it held the order of the Attorney General, No. 3229, made them confidential and forbade that they be received into evidence.

Under the decision of the Supreme Court of the United States in *United States v. Nugent*, 346 U. S. 1, it was held that the statute required the Department of Justice to make a fair, complete résumé or summary of all the FBI investigative report and give it to appellant. A résumé or summary was given to appellant on the hearing. A résumé or summary was made by the hearing officer to the Department of Justice.

The only way that the Court can determine whether the

summary that was given is adequate is to admit in evidence the FBI report. The only way the trial court could have discharged its responsibility in this case was to have the reports produced. The trial court must say whether the summary of the secret FBI report made by the Department of Justice under Section 6(j) of the act is fair and adequate.

It is necessary, therefore, that the FBI report be produced to the Court. Unless and until this Court sees and examines the FBI report and also unless and until appellant sees and examines the FBI report and compares it with the summary that should have been made or compares it with the summary made by the Department of Justice to the appeal board, there is no due process.

The Court cannot discharge its judicial function and determine whether the summary required by the Supreme Court of the United States in *United States v. Nugent*, 346 U. S. 1, is fair and adequate unless and until the Court has actually seen and examined the secret FBI report. In fact appellant's rights are not preserved unless and until he has had an opportunity to examine the secret FBI report and compare it with the summary required to be made.

The decision of the Supreme Court in *United States v. Nugent*, 346 U. S. 1, dealt only with the contention that the secret FBI report should be produced to the registrant at the hearing in the administrative agency.

The trial court, as a result of *Nugent v. United States*, 346 U. S. 1, must determine another and different question. It is whether the *Nugent* opinion required the trial court to determine whether a summary of the adverse evidence was needed to be given and, if given, was it adequate? The holding in the *Nugent* case required the court to do that in this case. The court cannot discharge the judicial function placed upon it in the *Nugent* case without seeing the FBI report. The report cannot be seen without admitting it into evidence.

Even though the records sought by the appellant are claimed to be confidential by the Attorney General's Order No. 3229 issued pursuant to 5 U. S. C. Section 22, they must

be produced because such documents are a part of and form the basis of the administrative determination and action supporting the indictment questioned by the registrant.

The only time the privilege of the Department of Justice pursuant to Attorney General's Order No. 3229 (5 U. S. C. § 22) has been permitted to override the claim of procedural due process has been in cases where there is a plain showing that the disclosure would endanger the national security.

The Supreme Court refused to compel the revealing of evidence that would endanger national security in the case of *United States ex rel. Knauff v. Shaughnessy*, 338 U. S. 537. But even in such a case two justices thought that the evidence ought to be revealed. Mr. Justice Frankfurter said in his dissent at page 549:

“ . . . Congress ought not to be made to appear to require that they incur the greater hazards of an informer's tale without any opportunity for its refutation, especially since considerations of national security, insofar as they are pertinent, can be amply protected by a hearing *in camera* . . . ”

Mr. Justice Jackson in his dissent wrote:

“Security is like liberty in that many are the crimes committed in its name. The menace to the security of this country, be it great as it may, from this girl's admission is as nothing compared to the menace of free institutions inherent in procedures of this pattern. In the name of security the police state justifies its arbitrary operations on evidence that is secret, because security might be prejudiced if it were brought to light in hearings. The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected

and uncorrected. Cf. *In re Oliver*, 333 U. S. 257, 268. . . . Likewise, it will have to be much more explicit before I can agree that it authorized a finding of serious misconduct against the wife of an American citizen without notice of charges, evidence of guilt and a chance to meet it.”—338 U. S., at pages 551-552.

There is surely no need under the guise of national security to conceal from the courts the contents of an FBI report of a conscientious objector. It is not one that may affect national security. After all, the FBI report of the conscientious objector merely deals with a man's daily conduct, his religious practices and his habits. If a question of security or national interest should ever come up in the report of the FBI concerning a conscientious objector, the Attorney General could show it. Then there would be no difficulty in keeping such matters secret. To deprive a man of valuable evidence that may affect his liberty on the ground of mere administrative privilege without some good ground for it is repugnant to free institutions. This was stressed in the concurring opinion of Mr. Justice Frankfurter in the case of *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, at page 172. That was the opinion of Mr. Justice Frankfurter under an order of the Attorney General that required appropriate investigation and determination.

Unless the Government can show some legally recognizable ground for refusing to produce the FBI report at the trial in the district court, then the FBI report must be produced at such trial for inspection and use by the defendant. The reasons why the report of the FBI must be produced have been set forth by the registrant. In opposition to these points the Government argues that Order No. 3229 of the Attorney General is sufficient to overcome the requirements of the Constitution, and “fair play.” However, Order No. 3229 was issued pursuant to 5 U. S. C. Sec. 22.

That statute provides that the order shall not be in contravention of law. It has been shown that the due process clause of the Fifth Amendment requires production of all material documents at trial. The Constitution requires due process. The due process requires a hearing and an opportunity to be heard. Order 3229, as here applied, is, therefore, in contravention of law.

While the Supreme Court has held that Order No. 3229 is valid, it has left open for the courts to decide the extent to which the Attorney General may use that order to deprive a party of the right to see and use documents. That was decided in *United States ex rel. Touhy v. Ragen*, 340 U. S. 462, at 469:

“. . . But under this record we are concerned only with the validity of Order No. 3229. The constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the Government he may refuse to produce government papers under his charge must await a factual situation that requires a ruling. This case is governed by *Boske v. Comingore*, 177 U. S. 459.”

In a concurring opinion, Mr. Justice Frankfurter said at page 472:

“There is not a hint in the *Boske* opinion that the Government can shut off an appropriate judicial demand for such papers.”

The Government gives no specific reason why the report is so confidential that it should not be produced, such as saying that the report has information the disclosure of which might affect internal security or might affect the interests of the Government in some specific way. A general privilege or departmental order, without a specific reason given, should not be permitted to deprive a party of valuable evidence to which he is entitled by law. This was ex-

pressed in the case of *Bank Line v. United States*, 163 F. 2d 133 (2d Cir.), by Judge Clark in a concurring opinion at page 139:

“ . . . but I think no general statement of prejudice to its best interests can or should be applied to any branch of the government, including the armed forces . . . ”

United States ex rel. Touhy v. Ragen, 340 U. S. 462, is not in point. There the proceeding did not involve the Government as a party or a criminal proceeding. (See note 6 of that opinion.) The specific provisions of the Rules of Criminal Procedure authorizing production of documents were not there involved. The decision involved the validity of Order No. 3229 on its face. (See notes 1 and 2 of the opinion for the order and Supplement No. 2.) It is the validity of the order, as construed and applied to the particular facts, that the Court is here concerned with.

The principle that distinguishes the *Touhy* case from this case is well expressed in *Kentucky-Tennessee Light and Power Company v. Nashville Coal Company*, 55 F. Supp. 65 (W. D. Ky.) as follows:

“I do not believe that the rule or the statute is applicable to the present case. In both of the cases referred to the federal employee involved was called as a witness and declined to testify. That is essentially different from being a party to the suit where there is a contest between the plaintiff and the defendant involving property which the defendant has taken into his possession.”

It has been repeatedly held that Order No. 3229 and 5 U. S. C. § 22 do not establish an inexorable privilege and command prohibiting disclosure of the FBI report in judicial proceedings. When it has become material in proceedings brought by the Government, it has been repeatedly held that the privilege was waived and the Government could

not successfully refuse to produce the report when demanded. It seems that when it became material in these administrative proceedings to determine the validity of the registrant's claim for classification as a conscientious objector, for the same reasons the FBI report must be produced. The citizen has the same rights to know the evidence against him before the administrative tribunal as when before the judicial tribunal. The administrative agency stands on no higher level before the Constitution than does the court.

“A prosecutor must, to be fair, not only use the evidence against the criminal, but must not willfully ignore that which is in an accused's favor. It is repugnant to the concept of due process that a prosecutor introduce everything in his favor and ignore anything which may excuse the accused for the crime with which he is charged. It is manifest in this matter that some one identified with the prosecution, as the circumstances indicate very clearly, ignored a very material piece of evidence which, if it had been brought to the attention of the jury or the trial judge, would certainly have resulted in the acquittal of this relator . . . another Judge has said—‘Though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained is unjust and dangerous to the whole community.’ *Hurd v. People*, 25 Mich. 405.”—*United States ex rel. Montgomery v. Ragen*, 86 F. Supp. 382, 387.

The argument of the Government and the cases relied upon by it that the withholding of the FBI statement is proper and required by Order No. 3229 and 5 U. S. C. § 22 have been distinguished in *United States v. Andolschek*, 142 F. 2d 503 (2d Cir.). There the court said:

“However, none of these cases involved the prosecution of a crime consisting of the very mat-

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“However, none of these cases involved the prosecution of a crime consisting of the very mat-

ters nearly enough akin to make relevant the matters recorded. That appears to us to be a critical distinction. While we must accept it as lawful for a department of the government to suppress documents, even when they will determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the document may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave transactions in the obscurity from which a trial will draw them, or it must expose them fully."

The competence of the document has been established by sources outside the document itself. Under the act and regulations the FBI report is relied on by the officials of the Selective Service System in making their final classification. This situation makes inapplicable the principle relied on by the Government. (*United States v. Krulewitch*, 145 F. 2d 87 (2d Cir.)). In that case the court said:

"But neither of these situations is like that at bar, where the competence of the document appeared without inspection, and inspection was necessary only to fulfill a procedural condition to its admission. In that situation inspection loses its character as a prying into the preparation of the prosecution and becomes merely a means of releasing evidence pregnant with importance in ascertaining the truth."

United States v. Beekman, 155 F. 2d 580 (2d Cir.), involved a prosecution for violations of the OPA regulations.

The trial court quashed the subpoena on a motion by the Government. On appeal the court reversed on account of the error. The court said:

“We have recently held that when the government institutes criminal proceedings in which evidence, otherwise privileged under a statute or regulation, becomes importantly relevant, it abandons the privilege.”

In *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949), the defendants were charged with a violation of the Sherman Act. The defendants moved for discovery under the Rules of Civil Procedure. The Attorney General was ordered to produce all FBI reports and other records relating to the activity of the defendants so that the trial court could determine whether they were privileged as claimed by the Attorney General. On refusal to produce, the trial court dismissed the Government's action. It appealed to the Supreme Court. The dismissal was affirmed by an equally divided court.—339 U. S. 940 (1950).

Department of Justice Order No. 3229, relied on by the Government in support of its position that it may not be required to produce the documents requested, gets its life from Section 22 of Title 5 of the United States Code. This section provides that the regulations must be “not inconsistent with law.”

The regulation, as construed and applied by the Attorney General in this case, is invalid and “inconsistent with law” expressed in Section 1670.17 of the Selective Service Regulations (32 C. F. R. § 1670.17) and in the Federal Rules of Criminal Procedure, Rule 17 (c), as interpreted in *Bowman Dairy Co. v. United States*, 341 U. S. 214. The rule is law and has the effect of an act of Congress. (*Beasley v. United States*, 81 F. Supp. 518, 527 (E. D. S. C. 1948)). A departmental regulation against disclosure must yield to an Admiralty Rule.—*O'Neill v. United States*, 79 F. Supp. 827, 830 (E. D. Pa. 1948). Order No. 3229 must also yield

to Section 13 (b) of the Universal Military Training and Service Act and Section 3 (c) of the Administrative Procedure Act.

In *United States v. Schine Chain Theatres*, 4 F. R. D. 108 (W. D. N. Y. 1944), it was held that the nondisclosure regulation of the Department of Justice "does not prevent the court from ordering the production of files of the Department of Justice in all cases. There may be certain of such files which are entirely privileged and others which are not."

In *Bank Line v. United States*, 163 F. 2d 133 (2d Cir.), Judge Augustus Hand said:

"It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies, which is at the base of our institutions. The existence of government privileges must be established by the party invoking them and the right of government officers to prevent disclosure of state secrets must be asserted in the same way procedurally as that of a private individual."—163 F. 2d 133, at 138.

This statement by Judge Hand is in line with what was stated by Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123. He said:

"Nothing has been presented to the Court to indicate that it will be impractical or prejudicial to a concrete public interest to disclose to organizations the nature of the case against them and to permit them to meet it if they can."—341 U. S., at p. 172.

The determination of whether the information sought

is privileged is not to be made by the Attorney General. That question is to be determined by the court and not the Department of Justice. In *Zimmerman v. Poindexter*, 74 F. Supp. 933, 935 (Hawaii 1947), the court said the "clear mandate that all executive regulations be 'not inconsistent with law' circumscribes the power of the entity prescribing the regulation under consideration, and operates to make the applicability and enforceability of a specific department regulation a judicial question for ultimate decision by the court".

This point is further supported by the holding in *Griffin v. United States*, 183 F. 2d 990 (D. C. Cir.), where the court said:

"However, the case emphasizes the necessity of the disclosure by the prosecution of evidence that may reasonably be considered admissible and usable to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful. 'The United States Attorney is the representative not of an ordinary party to the controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interests, therefore, in a criminal prosecution is not it shall win a case, but that justice shall be done. *Burger v. United States*, 205 U. S. 78, 88.'"—183 F. 2d, at p. 993.

Attorney General Clark recognized that the question of privilege is one for the court to decide rather than for the Attorney General when he, in his Supplement Number 2, June 6, 1947, which clarified Order No. 3229, among other things, wrote:

"If questioned the officer or employee should state that the material is at hand and can be submitted

to the court for determination as to its materiality in the case and whether in the best public interests the information should be disclosed.”

Recently, however, the Attorney General has instructed all United States Attorneys and all members of the Federal Bureau of Investigation to refuse to produce the FBI statement, even when requested and ordered by the courts. See Order No. 3229 (Revised), dated January 13, 1953, revoking Order No. 3229 (dated May 2, 1939) and Supplements 1, 2, 3 and 4 thereto, dated December 8, 1942, June 6, 1947, May 1, 1952, and August 20, 1952, which allowed the FBI report to be submitted to the court for a determination of whether it should or should not be produced.

This new policy established by Attorney General McGranery is contrary to the established rule of law announced many years ago by the Supreme Court. In considering the claim of privilege against producing documents containing trade secrets it has been held that it is a judicial decision for the court to make. Mr. Justice Holmes in *E. I. duPont de Nemours Powder Co. v. Masland*, 244 U. S. 100, said:

“ . . . and if . . . in the opinion of the trial judge, it is or should become necessary to reveal the secrets to others, it will rest in the judge’s discretion to determine whether, to whom, and under what precautions the revelation should be made.”—244 U. S., at 103.

The same rule ought to apply in the determination of the privilege urged by the Government.

On the trial of this case the question arose as to whether the verbal communication by the hearing officer to the appellant upon the occasion of his hearing constituted “a fair résumé” of the evidence that was adverse appearing in the FBI reports.

The Court cannot determine whether the résumé given at the hearing is fair without inspecting the secret investi-

gative report. That report cannot be inspected unless it is subpoenaed and produced at the trial.

It is submitted that the FBI report was not privileged and that the constitutional rights of the registrant were violated when it was not produced and not allowed to be used in evidence at the trial by the appellant.

POINT FIVE

The trial court committed reversible error in excluding relevant and material testimony offered by appellant for the purpose of showing that he was denied a full and fair hearing by the local board upon his personal appearance contrary to the regulations.

In the court below Tomlinson attempted to give evidence for the purpose of showing that he was denied a full and fair hearing upon the personal appearance. Since the hearing on personal appearance was oral it was highly relevant and material to receive the evidence offered by Tomlinson. —*United States v. Zieber*, 161 F. 2d 90 (3d Cir. 1947); *Niznik v. United States*, 173 F. 2d 328 (6th Cir. 1949).

Oral evidence was, therefore, to be properly received from appellant on what occurred. Appellant attempted to show that he had been denied the right to discuss his classification, point out material in the file that had been overlooked and give new and additional evidence. These were rights guaranteed by Section 1624.2(b) of the Selective Service Regulations.

The trial court excluded the evidence. The reason for the exclusion was that the record could not be changed. The trial court erroneously relied upon *Cox v. United States*, 332 U. S. 442. It overlooked the fact that this Court had decided in *Dickinson v. United States*, 203 F. 2d 336 (March 9, 1953), that the memorandum made by the local board on personal appearance was not a full and complete record. It was, as this Court said, a mere summary or epitome of the evidence given by the appellant. Since the

draft board memorandum did not purport to give a true and full record of what occurred, it was proper and permissible for the appellant to give oral testimony. This evidence was not objectional as an attempt to alter the record. To begin with the record was incomplete. The second reason is that the hearing was oral. Under the law the appellant, the draft board members and other persons present could testify. The only way that the violation of the regulations could be established is by oral testimony. Compliance with the regulations can also be shown by oral evidence.

It is manifest that the trial court fell into error. The conclusion reached by the trial court is that the basis for the exclusion of the offered evidence was patently unsound. It was in contradiction to the usual practice followed in these district courts in the trial of draft cases where it is contended that there has been a violation of rights upon personal appearance.

The appellant was entitled to show or try to establish that his rights had been violated and that the doctrine of *Davis v. United States*, 199 F. 2d 689 (6th Cir.), and *Bejelis v. United States*, 206 F. 2d 345 (6th Cir.), applied. Since he was denied this right to his prejudice by the trial court, reversible error was committed. Because of this error the case should be remanded and a new trial ordered in the event that this Court does not reach the conclusion that the trial court should have granted the motion for judgment of acquittal.

CONCLUSION

WHEREFORE appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to grant the motion for judgment of acquittal. The appellant, in the alternative, requests the Court to remand the case for new trial because of the error of the trial court in excluding relevant and material evidence, the secret FBI investigative reports and the oral testimony offered

by the appellant as to what occurred on the personal appearance.

Respectfully,

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Counsel for Appellant

December, 1953.



No. 13892

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
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MANLEY J. BOWLER,
*Assistant United States Attorney,
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JAN 15 1954

PAUL P. O'BRIEN



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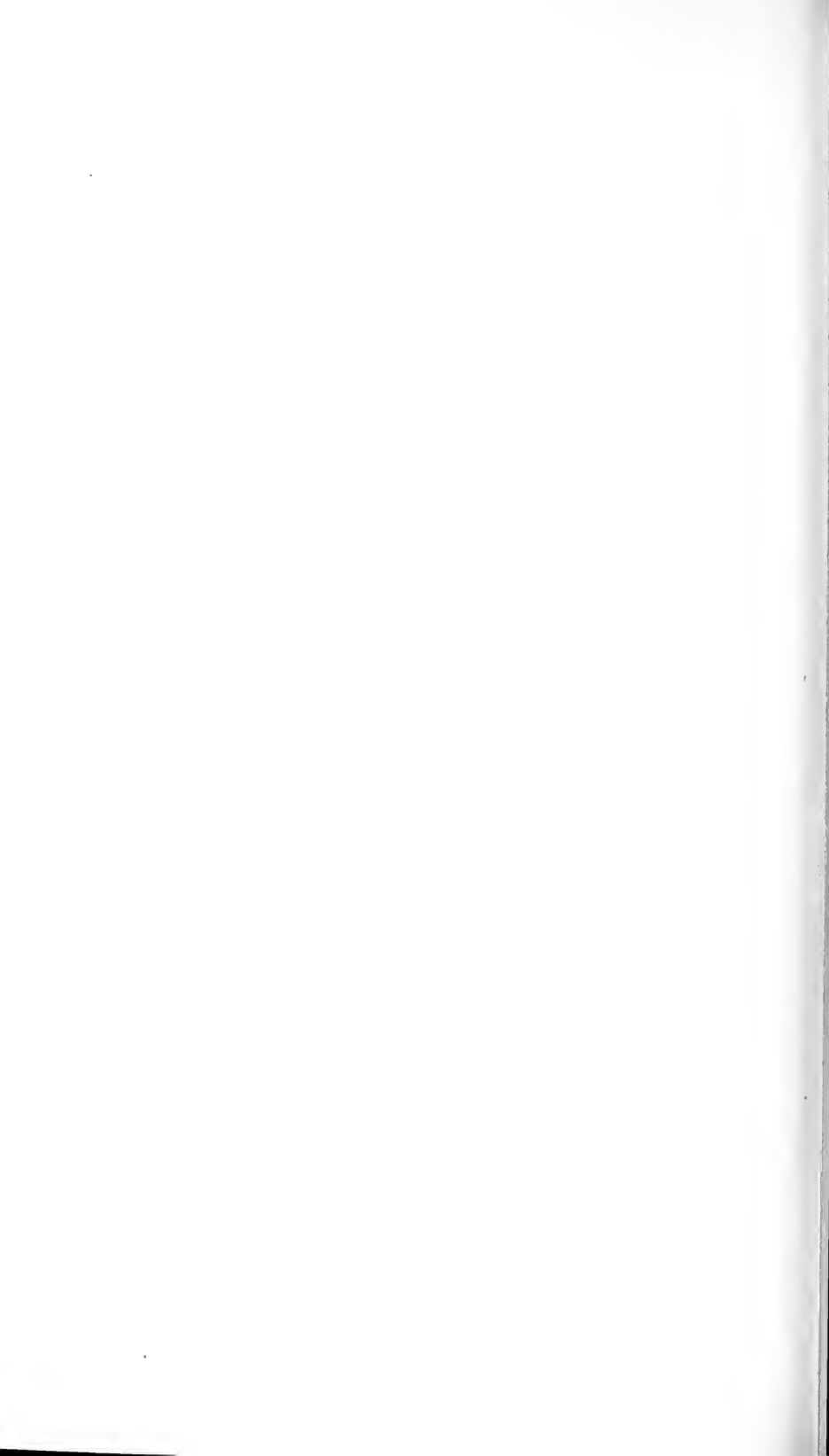
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No. 13892

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 4, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [I,¹ pp. 2-3.]

On October 6, 1952 the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on November 17, 1952.

On January 6, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a

¹"I" refers to Transcript of Record, Vol. I.

jury, and on March 30, 1953, the appellant was found guilty as charged in the indictment. [I, p. 38.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [I, p. 41.] Appellant appeals from this judgment. [I, pp. 44-45.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

STATUTES INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment . . .”

III.

STATEMENT OF THE CASE.

The indictment charges as follows:

“Indictment—No. 22461-CD Criminal [U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948].

“The Grand Jury charges:

“Defendant John Alan Tomlinson, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 82, said board being then and there duly created and acting under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said Act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 18, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place on or about July 21, 1952, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.” [I, pp. 2-3.]

On October 6, 1952, appellant appeared for arraignment and plea, represented by Harold Shire, Esq., before the Honorable William C. Mathes, United States District

Judge, and entered a plea of Not Guilty to the offense charged in the indictment.

On January 6, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and Harold Shire, Esq., represented the defendant-appellant. On March 30, 1953, Appellant was found guilty as charged in the indictment. [I, p. 38.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [I, p. 41.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The district court erred in failing to grant the Motion for judgment of acquittal duly made at the close of all the evidence. [App. Spec. of Error 1; App. Br. p. 13.]²

B. The district court erred in convicting the appellant and entering a judgment of guilt against him. [App. Spec. of Error 2; App. Br. p. 13.]

C. The district court erred in denying the motion for new trial. [App. Spec. of Error 3; App. Br. p. 14.]

D. The district court committed reversible error in refusing the appellant the right to use the secret F.B.I. investigative report at the trial as evidence to determine whether the summary of the adverse evidence given to the appellant by the hearing officer of the Department of Justice was fair and adequate as

²"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

required by due process of law, the Act and regulations. [App. Spec. of Error 4; App. Br. p. 14.]

E. The district court committed reversible error in refusing appellant the right to testify about how he had been denied a full and fair hearing upon personal appearance by the local board. [App. Spec. of Error 5; App. Br. p. 14.]

IV.

STATEMENT OF THE FACTS.

On October 18, 1949, John Alan Tomlinson registered under the Selective Service System with Local Board No. 116, Los Angeles, California. He was eighteen years of age at the time, having been born on August 13, 1931. He gave his occupation as "baker" and indicated he was employed at the Walter Bowie Pie Company in Los Angeles, California. [F. 1.]³

On September 11, 1950, the appellant filed with Local Board No. 82, SSS Form 100, Classification Questionnaire. [F. 4-11.]

In Series VI of the Questionnaire he stated that he was a minister of religion, and that he served regularly as a minister of Jehovah's Witnesses. [F. 6.] He stated that he was a "baker" and had worked with his present employer for three years, and expected to continue indefinitely at the trade. [F. 7.] He stated that he worked

³Numbers preceded by "F" appearing herein within brackets refer to pages of Appellant's draft board file, Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identified the pages in the draft board file.

an average of 40 hours per week and was paid at the rate of \$1.55 per hour. [F. 8.] The appellant signed Series XIV of that Questionnaire, and thus, informed Local Board No. 116 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 10.]

SSS Form 150, Special Form for Conscientious Objectors was furnished to the appellant and he completed this form and filed it with the Local Board No. 116 on September 18, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 20-23.]

On October 5, 1950, the appellant was classified in Class I-A, and was mailed SSS Form 110, Notice of Classification, on October 6, 1950.

On October 9, 1950, the appellant requested a personal appearance before the Board and was granted such personal appearance on November 17, 1950. [F. 34-35.]

On November 30, 1950, the appellant filed Notice of Appeal from his classification. [F. 36.] On January 10, 1951, the applicant filed affidavit of dependency claiming entitlement of deferment and to be placed in Class III-A, registrant with child or children and registrant deferred by reason of extreme hardship and privation to dependents. [F. 49-50.] The notice of rejection of the claim and decision not to reopen the classification was mailed to the appellant. [F. 51.]

On April 30, 1952, the appellant was classified in Class I-A-O and notice thereof was mailed to appellant on May 7, 1952. [F. 11.]

On July 1, 1952, SSS Form 252, Order to Report for Induction, was mailed to the appellant ordering him to report for induction on July 18, 1952. [F. 68.] The appellant reported for induction but refused to submit to induction into the armed forces of the United States. [F. 85.]

V.

ARGUMENT.

POINT ONE.

The Board of Appeals Had Basis in Fact to Classify the Appellant in Class 1-A-O and Its Action Was Neither Arbitrary nor Capricious.

The Statute granting the exemption reads as follows:

Title 50, App., United States Code, Section 456, Deferrals and exemptions from training and service.

“(j) Nothing contained in this title shall be construed to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form”

It is necessary, however, for a person who claims exemption from combatant, or non-combatant training, to have his claim sustained by his local, or thereafter his appeal board.

Thus, such a registrant must satisfy the Selective Service Board as to the validity of his claim for exemption in the following particulars:

- (1) He must be conscientiously opposed to war in any form;
- (2) This opposition must be by reason of the registrant's religious belief, and

- (3) His religious training;
- (4) In addition the character of the registrant, and
- (5) The good faith and sincerity of his objections are judged.

If the registrant, or his claim for exemption, fails to satisfy the Selective Service Board in any one of the following particulars, there is a basis in fact for the classification of the Board in refusing the exemption, in whole or in part.

(1) Conscientious Objection to War in Any Form.

Preparedness for war and protection of our country is self defense. A person who says that he will defend himself, or his family, or his possessions, or his church but not his country—is merely setting his own standards of what is right and what should be defended. The law does not allow him to make such a choice and still claim exemption from Military Service. He is not opposed to war in any form; this in itself constitutes a basis-in-fact to sustain the classification of a Selective Service Board.

United States v. Dal Santo, 205 F. 2d 429.

It may be that the sincerity of this group of claimants for exemption, or some of them, can not be questioned. Yet, Congress has seen fit to grant the conscientious objection exemption only to those who are opposed to war in any form.

(2) Religious Belief.

Religious training and belief is defined in the statute as follows:

“ . . . Religious training and belief in this connection means an individual's belief in relation to a

Supreme Being involving duties superior to those arising from any one religion, but does not include essentially political, sociological or philosophical views or of merely personal moral code”

50 U. S. C., Sec. 456(j), as amended June 19, 1951, c. 144, Title I, Sec. 1(1-q), 65 Stat. 83.

Thus, a conscientious objection on political, moral or humanitarian grounds, sincere though it may be, does not qualify a registrant for the exemption.

Although a personal belief is a subjective matter, it is manifested by objective evidence. A registrant is able to state what these objective manifestations of his belief are in the special conscientious objection form (Selective Service Regulation 1621.11). The registrant is further able to submit any additional information to substantiate his claim.

United States v. Nugent, 346 U. S. 1.

If the Form 150, or other evidence submitted by the registrant is incomplete in any respect, this would be a basis in fact for a classification refusing the exemption in whole or in part.

Linan v. United States, 202 F. 2d 693 (9th Cir.).

(3) Religious Training.

The opposition to war in any form must be by reason of a registrant's religious training and belief. Religious training is a requirement in the conjunctive. Further, it is an objective standard to which the Board may look to determine the sufficiency and good faith of the registrant's belief. If a registrant falls short of his burden, there would be a basis of fact for the Board's classification.

(4) and (5) Character of Registrant, Sincerity and Good Faith Objections.

There are many things on which the Selective Service Board could question the character of the registrant, and the sincerity and good faith of his objections. If any one of these appeared in the Selective Service file, there would be basis in fact for this classification.

Inasmuch as the Board is examining the registrant's belief, anything which would show lack of sincerity or good faith would be a basis in fact for denial of the classification.

POINT TWO.

The Local Board, Upon Personal Appearance, Did Not Deprive the Appellant of a Full and Fair Hearing, nor Was There a Violation of the Appellant's Rights as Guaranteed by the Regulations, the Act, and the Fifth Amendment.

The résumé of the appellant's personal appearance before the Local Board on October 20, 1950, appears in Government's Exhibit No. 1, page 35. There it is noted that the Local Board considered many things among which were the possibility of the registrant's gaining classification as a minister. The Board also asked about the appellant's willingness to serve in a non-combatant capacity, whether or not the appellant would be willing to defend himself or his family. The appellant thus had opportunity to fully state his entire case to the Local Board and did state his case to the Local Board. It appears that *Cox v. United States*, 332 U. S. 442, governs in this particular case.

"The provision making the decision of the local boards 'final' means to us that Congress chose not to

give the administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.”

The law presumes that the Local Board has done its duty. *Koch v. United States*, 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded. *Tyrrell v. United States*, 200 F. 2d 8. Furthermore, the classification anew by the Appeal Board had the effect to cure any defects that may have occurred in the Local Board’s personal appearance.

Title 32, Code of Federal Regulations, Section 1626.26, states that when the Local Board reopens the registrant’s classification:

“(a) The Appeal Board shall classify the registrant, giving consideration to the various classes in the same manner in which the Local Board gives consideration thereto when it classifies a registrant, except an Appeal Board may not place a registrant in Class 4-F because of the physical or mental disability, unless the registrant has been found by the Local Board or the Armed Forces to be disqualified for any military service because of physical or mental disability;

(b) Such classification of the registrant shall be final, except where an appeal to the President is taken. . . .”

POINT THREE.

There Is No Denial of Due Process Upon the Personal Appearance of the Appellant Before the Hearing Officer in the Department of Justice Where the Hearing Officer Did Not Disclose the Contents of F.B.I. Investigative Report on the Appellant's Conscientious Objector Claim.

Section 6(j) of the Act, 50 U. S. C., App., Section 456(j) (62 Stat. 609), provides for the hearing of the Department of Justice. *United States v. Nugent*, 346 U. S. 1, is the controlling case here. That case held that it is the duty of the Hearing Officer to give a summary of the adverse information if the appellant asks for such adverse information and if there is such adverse information in its file. Herein the appellant did not ask for the summary of the adverse information. Therefore, it was unnecessary for the Hearing Officer to give him a summary.

It is noted that prior to such a hearing, the Hearing Officer mails to the registrant a notice of hearing and instructions to registrants whose claims for exemption as conscientious objectors had been appealed. These instructions provide in part:

“2. Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the Hearing Officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to and tends to defeat the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.”

Since there is no constitutional right to exemption because of religious training and belief, any claim of denial of due process must necessarily then be based upon a variance from the procedure established by Congress or by administrative officials under a proper delegation of power. The evidence in the present case discloses no request by the appellant for adverse information held by the Hearing Officer. Without such a request, there is no duty which can be visited upon the Hearing Officer requiring him to disclose any information, either favorable or adverse to the appellant. It is therefore submitted that no denial of due process can be shown by the failure of the Hearing Officer to disclose any adverse information which may have been contained in the reports of the Federal Bureau of Investigation.

POINT FOUR.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the Federal Bureau of Investigation Investigative Report and Excluded It From Inspection and Use by the Appellant in the Trial of This Case.

The argument discussed previously under Point Three of the Appellee's Brief is herein incorporated in full as if set out here. *United States v. Nugent, supra*, appears to be the controlling case in this regard. The court held such a procedure as occurred in this case was constitutional. It stated that the statutory scheme for review of exemptions claimed by the conscientious objectors does not entitle them to have the investigator's report reproduced for their inspection, on pages 5 and 6 of the opinion. Furthermore, it is within the power of a trial court to exclude irrelevant, immaterial and incompetent evidence.

Procedural irregularities or omissions which do not result in prejudice to the appellant are to be disregarded. *Martin v. United States*, 190 F. 2d 775; *Atkins v. United States*, 204 F. 2d 269.

POINT FIVE.

The Classifications of the Local Board Made in Conformity With the Regulations Are Final if There Is a Basis in Fact for the Decision of the Local Board.

The appellant had opportunity to place a summary of his basis for a claim as a conscientious objector in his SSS Form 150, Form for Conscientious Objector, and the appellant did take advantage of this opportunity. Furthermore, the appellant may at any time mail information into the Local Board and direct that it be placed into his file. The facts appear that the appellant took advantage of this opportunity also. It appears that the appellant was given a reasonable opportunity to submit new information and the Local Board did look at some of the information before it. The regulations do not require that the local draft board consider unlimited information, nor need it allow the registrant unlimited time in its appearance before them. The appropriate section is Title 32, Code of Federal Regulations, Section 1624.2(b):

“At any such appearance the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked, or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such informa-

tion shall be in writing, or if oral, shall be summarized in writing, and in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. A member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary."

Furthermore, the law presumes that the Local Board has done its duty, *Koch v. United States*, 150 F. 2d 762, and procedural errors or irregularities which do not result in prejudice to the registrant are to be disregarded.

In *Cox v. United States*, *supra*, on the point of finality of the Local Board's action, whether or not the decision was erroneous as long as there was a basis in fact for the classification, it does not provide for going into the hearing itself. The summary of the Local Board appearance and action goes in the record. The defendant is limited in his proof to the Selective Service file.

VI.

CONCLUSIONS.

The appellant must convince the Local Board and later the Appeal Board of his right to exemption. The power to classify rests solely in the Selective Service System. Their decision in conformity with regulations is final, even though erroneous.

If there are no such procedural irregularities as would prejudice the right of the registrant, and if there is a basis in fact for the classification given to the registrant, the classification is valid. There is the required basis in

fact in this case. No action of the Local Board or the Appeal Board was arbitrary or capricious.

There was no denial of due process in the classification of the appellant.

There was no error of law in the ruling of the trial court, and therefore, the conviction should be affirmed.

The District Court did not err in denying the motion for acquittal made at the close of all the evidence.

The District Court did not err in denying the motion for a new trial.

The District Court did not err in refusing to allow the Federal Bureau of Investigation's investigative report into evidence.

Respectfully submitted,

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No. 13892

**United States Court of Appeals
FOR THE NINTH CIRCUIT.**

JOHN ALAN TOMLINSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court
for the Southern District of California,
Central Division.

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FILED

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**PAUL P. O'BRIEN
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No. 13892

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MAY IT PLEASE THE COURT:

What has been stated in the reply briefs for appellant in *Basil Leroy Sterrett v. United States of America*, No. 13901, and in *Joseph David Triff v. United States of America*, No. 13952, filed in this Court, will not be repeated here. The Court will be referred to information in those briefs. Appellant, however, desires to make reply to the brief of appellee.

I.

The appellee argues erroneously, at pages 8 and 10 of its brief, that the character of the registrant is involved. This has been adequately answered in the reply brief in the *Sterrett* case under Point I.

II.

The appellee argues, at page 9 of its brief, that it is necessary for the registrant to satisfy the board that he is entitled to the exemption claimed. All that the registrant must do is to satisfy the law by the undisputed facts. If the board is not satisfied by undisputed facts that satisfy the law, then there is no basis in fact for the classification. The registrant is not bound by the decision even though he cannot satisfy the board. See also what has been said on this question in the *Sterrett* reply brief under Point II.

III.

The appellee argues, at page 8 of its brief, that because Tomlinson will defend himself he is not entitled to claim conscientious objections to war in any form. This has been answered in the reply brief for appellant in the companion case of *Joseph David Triff v. United States of America*, No. 13952, filed in this Court, under Point III. See also *Annett v. United States*, 205 F. 2d 689 (10th Cir. June 26, 1953); and *United States v. Pekariski*, 207 F. 2d 930 (2d Cir. Oct. 23, 1953), followed in *Taffs v. United States*, 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States v. Hartman*, — F. 2d — (2d Cir. Jan. 8, 1954).

IV.

The appellee argues, at page 8 of its brief, that only those who are opposed to war in any form are entitled to classification as conscientious objectors. This argument was rejected in *Taffs v. United States*, *supra*; and *United States v. Hartman*, *supra*. See also *Annett v. United States*, *supra*; and *United States v. Pekariski*, *supra*.

V.

The appellee says, at page 9 of its brief, that conscientious objections are to be determined only by objective standards. Regardless of what standards are employed they are to be gauged by the statute and the regulations. The appellant satisfies the definition of "conscientious objector" appearing in the statute and the regulations.

VI.

The argument is made by the appellee, at page 10 of its brief, that there is no denial of procedural due process upon the personal appearance. It is said by the appellee that the appellant had the opportunity to state his case fully. It is not contended that the board deprived Tomlinson of his right to say anything. Appellant contends that the draft board violated the law when it held that he could not be a minister unless he attended a theological school. See appellant's main brief at pages 27 to 30.

VII.

It is argued by appellee, at page 11 of its brief, that the appeal board made a new classification that cured the error of the local board. This fallacious argument was condemned in *United States v. Zieber*, 161 F. 2d 90 (3rd Cir.); *United States v. Laier*, 52 F. Supp. 392 (N. D. Calif. S. D.); *United States v. Romano*, 103 F. Supp. 597 (S. D. N. Y.); *Davis v. United States*, 199 F. 2d 689 (6th Cir.); *Bejelis v. United States*, 206 F. 2d 354 (6th cir.).

VIII.

Appellee contends, at pages 12-13 of its brief, that Tomlinson waived his right to complain about the failure of the hearing officer to give him a summary of the FBI report because he did not ask for the summary. The hearing officer waived the requirement that Tomlinson request the unfavorable evidence. The hearing officer testified at the trial that in every case where there was adverse information he

always told the registrant about it and attempted to summarize the unfavorable evidence. See appellant's main brief at pages 7-8. Since he did this, the appellee is out of place in contending that there was no request for the unfavorable information.—*United States v. Stasevic*, No. C. 142-143, Southern District of New York, December 17, 1953.

IX.

It is argued by the appellee at page 13 of its brief, that no error was committed when the trial court refused to allow the secret investigative report to be used at the trial. The order of the court below is in conflict with the following cases: *United States v. Evans*, 115 F. Supp. 340 (D. Conn. Aug. 20, 1953); *United States v. Stull*, Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States v. Brussell*, No. 3650, District of Montana, November 30, 1953; *United States v. Parker* and *United States v. Broadhead*, Nos. 3651, 3654, District of Montana, December 2, 1953; *United States v. Stasevic*, No. C. 142-143, Southern District of New York, December 17, 1953.

X.

Appellee argues that the denial of the right to use the FBI report is harmless error. This argument ignores the case of *Kotteakos v. United States*, 328 U. S. 750.

The administrative law cases cited by the appellee on harmless error are not authority for what constitutes error in the judicial body. What may be harmless error before an administrative agency may be the grossest sort of injustice in the judicial arena. There is no comparison between standards of due process in the administrative agency and the judicial body. Hearsay is permitted in the administrative agency; it can never be allowed in court when objected to. This is especially true in criminal cases in view of the constitutional right of the confrontation of witnesses.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

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No. 13893

**United States Court of Appeals
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CLAIR LAVERNE WHITE,

Appellant,

vs.

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BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
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The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A-O. 14-33

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case. 33-35

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No. 13893

**United States Court of Appeals
FOR THE NINTH CIRCUIT.**

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

**Appeal from the United States District Court for the
Southern District of California,
Central Division**

JURISDICTION

This is an appeal from a judgment of conviction rendered by the United States District Court for the Southern District of California, Central Division. [I 27-28]¹ The

¹ Numbers appearing herein within "brackets" preceded by a Roman numeral I refer to the pages of the typewritten transcript of the record filed by the clerk of the United States District Court; when preceded by Roman numeral II the figures appearing within brackets refer to the stenographer's transcript of the proceedings at the trial.

district court made no findings of fact or conclusions of law. No reasons were given by the court for the judgment rendered. The court merely found the appellant guilty as charged in the indictment. [I 23] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [I 2-3] This Court has jurisdiction of this appeal under Rule 37(a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [I 29]

STATEMENT OF THE CASE

The indictment charged the appellant with a violation of the Universal Military Training and Service Act. It was alleged that, after registration and final classification, the appellant was ordered to report for induction. It is then alleged that he "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [I 2-3] Appellant was arraigned and pleaded not guilty. [I 4] Trial by jury was waived and he consented to trial by the court. [I 6]

The secret investigative FBI report was subpoenaed. The Government made a motion to quash the subpoena. The court overruled the motion.

The case was called for trial and evidence was heard. [II 1-58] A motion for judgment of acquittal was made at the close of the evidence. [I 17-21] The motion was denied. [I 23; II 53] The court found the appellant guilty as charged. [I 23; II 53] A motion for new trial was filed. [I 25-26] The motion for new trial was denied. [I 27; II 55] The court sentenced appellant to four years in the custody of the Attorney General. [I 27-28; II 58] Notice of appeal was duly and timely filed. [I 29] The transcript of the record including statement of points relied on has been filed in this Court.

THE FACTS

Clair Laverne White was born July 13, 1931. (1)² He registered with his local board in Los Angeles on July 14, 1949. (2, 3) He was mailed a classification questionnaire on October 20, 1950. (3, 5) He filled out this questionnaire properly and filed it with the local board on November 9, 1950. (4, 5)

The name and address of the appellant were shown in the questionnaire. (6) In Series VI he answered that he was a minister of religion. He stated that he customarily and regularly served as such. He added that he was a minister of Jehovah's Witnesses. (7)

He stated that he was also a punch press operator employed by the North Hollywood Tool and Manufacturing Company. (8) He worked 48 hours per week and made \$1.20 per hour at this job. (9) He signed the conscientious objector blank under Series XIV. (11)

The local board mailed to White a special form for conscientious objector on November 13, 1950. (12, 15) White filled out the form and returned it to the local board on November 20, 1950. (15)

He signed Series I (B) in the special form for conscientious objector. By so doing he certified that he was conscientiously opposed to both combatant and noncombatant military service. He answered that he believed in the Supreme Being. He described the nature of his beliefs that involved duties which were superior to those owed to the state. He said that he was obliged to render "pure and undefiled worship of the most high God. Yes, I must obey God in all things." (15)

He cited several scriptures supporting his stand as a conscientious objector. He stated that he got his belief from his parents. He showed that they had taught him the beliefs of Jehovah's Witnesses to be found in the Bible since child-

² Figures appearing in "parentheses" refer to pages of the draft board file, Government's Exhibit No. 1. The pages are numbered in long-hand at the bottom and the numbers are circled.

hood. (16) He stated that he relied upon his father for religious guidance. (16)

He answered that he did not believe in the use of force under any circumstances. (16) By studying the Scriptures and telling others what he believed as a minister he stated that this demonstrated his depth of conviction and consistency of belief. He said that he gave public expression at every opportunity concerning his belief in the Almighty God. (16)

He listed the schools that he had attended, his employers and his places of residence. (13, 16) He gave the name and address of his parents and showed that they were Jehovah's Witnesses. (9, 13) He showed that he was not a member of any military organization but that he was a member of a religious organization. (19) He said that he was one of Jehovah's Witnesses and that the Watchtower Bible and Tract Society was the legal governing body of that organization. (19) He showed that he had become a member by being baptized on August 24, 1941, at Titusville, Pennsylvania. (19) He gave the address of the church and listed, as the presiding minister, Frank Pisel.

He described the belief of Jehovah's Witnesses in respect to bearing arms. He said that they objected and he objected because "we obey the laws of the land only as long as they do not conflict with God's laws." He then quoted Acts 5:29 as follows: "We ought to obey God rather than men." (19) He then gave a list of names for references. (20) He signed the conscientious objector form at the end. (20)

On January 15, 1951, the local board classified White in Class I-A-O. This classification made him liable for non-combatant military service in the armed forces. (12) He was notified of this classification. (12) He wrote a letter to the board requesting a personal appearance. (12, 23) The local board notified him to appear before it on January 29, 1951. (12) He appeared for personal appearance at the time and place fixed by the board. (22)

A short memorandum was made of the personal appearance by the local board. (22) After the hearing was over the board concluded not to reopen his case. White was continued in Class I-A-O. (12) The local board, however, noted that the case was reopened "automatically on appearance." (24) In the minutes it is stated that White was "in defense work—case not reopened. Continued I-A-O." (12)

On January 30, 1951, White's mother wrote a letter to the local board stating in detail his beliefs as one of Jehovah's Witnesses and emphasizing his stand as a conscientious objector. She requested that he be classified as a minister. (25-27)

On February 7, 1951, White wrote a letter of appeal to the board. He argued his conscientious objector stand and stated that he was neutral to the wars between the nations. (28-30) The local board notified him to appear for a physical examination. (31) On March 1, 1951, he wrote a letter to the board and sent in affidavits corroborating his stand as a conscientious objector and minister. (32-35)

The report of the physical examination was received by the board. On March 16, 1951, the local board notified White of his physical acceptability for service in the armed forces. (37) The board of appeal reviewed the file on April 11, 1951, and made a preliminary determination that White was not entitled to the conscientious objector classification. This order caused the file to be referred to the Department of Justice for appropriate inquiry and hearing. (12) The file was on that date forwarded to the Department of Justice. (38)

After an extensive investigation by the FBI a secret report was made. This report of the investigation was forwarded to the hearing officer. [II 38]

White was notified on February 6, 1952, to appear before the hearing officer for a hearing on March 6, 1952. (41) He appeared. The hearing officer asked him some questions. White told the hearing officer that none of his brothers and

sisters went into the army. [II 39] He showed him that he had been one of Jehovah's Witnesses since he was three years old. [II 39] He testified that he went to church three times a week. He told the hearing officer that he would not kill, even if the Russians came into this country and killed his parents. He stated that he would trust in the power of Almighty God to resurrect his parents if they were killed. [II 39-40]

He stated that he would not do work of any national importance and would not help in the war effort in any manner. [II 40] He asked the hearing officer if there was any unfavorable evidence and the hearing officer replied that there was not any unfavorable evidence in the FBI report. [II 40] At the close of the hearing, the hearing officer told him not to worry about his claim for classification as a conscientious objector. [II 41]

The hearing officer then made a report to the Department of Justice. He found that White worked in a machine shop making tools and dies. He also found that White worked on war contracts from 1949 to 1951. He said that White had been brought up in the faith of Jehovah's Witnesses and that he insisted his conscientious objections were predicated on religious training and belief. He found that White went to church two or three times a week. He also said that White preferred to go to prison rather than go to the army. The hearing officer said: "It is quite obvious that these people are rather fanatical in their beliefs. Statements were made that they would not assist in any material way, but only spiritually in case of necessity." (42)

The hearing officer concluded that there "is no question in my mind but that the registrant is sincere, but from all of the evidence I would recommend that he be placed in noncombatant service, or I-A-O." (43)

The Attorney General followed the recommendation of the hearing officer and wrote the board of appeal that White should be classified in Class I-A-O. (44) On May 13, 1952, the board of appeal, classified White in Class I-A-O. (12,

39) On May 19, 1952, the file was returned to the local board and White was notified of the classification. (12)

On May 29, 1952, White wrote a letter of appeal to the National Director. He requested that the National Director appeal his case to the President. This letter, dated May 27, 1952, was filed with the board on the 29th. (12)

The local board reviewed the file on June 9, 1952, and determined to take no action. (12) Appellant was ordered to report for induction on July 7, 1952. (12, 47) He did not report. The local board wrote him a letter to report within five days after July 11, 1949. (49) On July 14, 1952, the board ordered him to report for induction by letter on July 18, 1952. (49) White reported on July 18, 1952, and refused to submit to induction. (50) He signed a statement refusing to be inducted. (52)

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based on his sincere belief in the Supreme Being. He showed that his obligations to the Supreme Being were superior to those owed to the Government. The file showed that his beliefs were not the results of political, philosophical, or sociological views but that they were based solely on the Word of God. (15-20)

The local board classified White as a conscientious objector liable for performance of noncombatant military service in the armed forces. (12) On a hearing before the board the I-A-O classification was continued. (12) There was no evidence in the file showing that White was willing to do noncombatant military service as a conscientious objector.

The case was referred to the Department of Justice for appropriate inquiry and hearing. The secret investigative

report was favorable to the claim of White. The hearing officer found that White "would not assist in any material way." (42) The hearing officer found White to be sincere but recommended that he be ordered to do noncombatant service. (43) The appeal board classified White in Class I-A-O. He was made liable for noncombatant military training and service in the armed forces. (12, 39)

In the motion for judgment of acquittal it was contended that the denial of the conscientious objector and the recommendation of the hearing officer of the Department of Justice were without basis in fact, arbitrary, capricious and contrary to law. [I 19]

In the motion for new trial it was complained that the court erred in denying the motion for judgment of acquittal. [I 25]

The question presented here, therefore, is whether the denial for claim for classification by the appeal board and the recommendation by the Department of Justice were arbitrary, capricious and without basis in fact.

II.

Appellant's case was referred to the Department of Justice for appropriate inquiry and hearing. Following a secret investigation by the FBI a report was made to the hearing officer of the Department of Justice. White was called before the hearing officer for a hearing. He asked the hearing officer if there was anything unfavorable in the secret investigative report of the FBI. The hearing officer said there was no unfavorable evidence in the report. [II 40]

At the trial White caused to be subpoenaed the secret investigative report made by the FBI. A motion to quash was made by the Government and denied. [II 22] The hearing officer had the secret investigative report of the FBI before him. [II 38] The FBI report was marked for identification. [I 15-16; II 44-45, 46, 47]

Appellant moved that the FBI report be put into evidence. The motion was denied. [I 16; II 45] The trial court

inspected the secret investigative report. He found that from an investigation and examination it was material on whether the hearing officer had stated the truth when he said that there was no unfavorable evidence in the report. [II 47-48]

The trial court excluded the FBI report from evidence under the authority of Order 3229 of the Attorney General. [II 48]

In the motion for judgment of acquittal it was contended that appellant had been deprived of his rights to due process of law by failure of the court to compel the production of the secret investigative reports at the trial. [I 21] In the motion for new trial complaint was made of the error of the court in not receiving into evidence and not allowing appellant to examine the secret investigative report of the FBI for the purpose of determining whether or not there had been a fair and adequate summary made of the adverse evidence upon the occasion of the hearing before the hearing officer. [I 25-26]

The question presented here, therefore, is whether the trial court committed reversible error when it excluded from evidence the secret investigative report of the FBI and denied appellant the right to have the report produced for the purpose of determining whether or not a fair and adequate summary of the adverse information appearing in the report was given by the hearing officer to appellant.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting the appellant and entering a judgment of guilt against him.

III.

The district court erred in denying the motion for new trial.

IV.

The district court committed reversible error upon the trial when it excluded the secret investigative FBI report and denied appellant the right to have it used at the trial to determine whether or not the hearing officer made a fair and adequate summary of the adverse evidence appearing in the report as required by due process of law, the act and the regulations.

SUMMARY OF ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A-O.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 62 Stat. 609) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to the Almighty God higher than those to the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. He specifically said they were not the result of a personal moral code. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses.

The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States v. Alvics*, 112 F. Supp. 618 (1953); *Annett v. United States*, 205 F. 2d 689 (10th Cir. 1953); *United States v. Graham*, 109 F. Supp. 377 (W. D. Ky. 1952); *United States v. Pekariski*, — F. 2d — (2d Cir. Oct. 23, 1953).

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the report to be marked for identification and received as a sealed exhibit after the trial court made an inspection of the exhibit. The trial court found the secret FBI report to be material but refused to permit it to be used as evidence.

The trial court committed grievous error when it re-

fused to permit the exhibit to be used as evidence. He merely received the exhibit and permitted it to be marked for identification and inspected it himself. He excluded it and permitted the exhibit to come before this Court in sealed form for the limited purpose of determining whether or not he was in error in excluding the exhibit.

The hearing officer told White that the FBI report was favorable to him and that he would not have to worry about his conscientious objector claim. It may be argued that because of this it leaves no basis for demanding the report to be produced at the trial. But the statement by the hearing officer does not cure the error of the court below. It was for the court below to say whether the statement made by the hearing officer is true.—See the last paragraph of the opinion in *United States v. Packer*, 200 F. 2d 540 (2d Cir.).

White requested notice of the adverse evidence. The hearing officer told him there was nothing unfavorable in the report. The hearing officer nevertheless recommended against the full conscientious objector claim. The refusal to give a summary of the FBI report to White and the unfavorable recommendation commands that the statement of the hearing officer that there was nothing unfavorable in the report not be relied upon to hold as harmless error the action of the court below. In view of the judicial function put on the trial court to determine if a summary was required neither it nor this Court can rely upon the statement of the hearing officer that the report was favorable as a basis for refusing the production of the FBI report.

The claim of privilege is not applicable here. The Government waived its rights under the order of the Attorney

General, No. 3229, when it chose to prosecute appellant in this case. The FBI report was found to be material by the trial court. The judicial responsibility imposed upon the trial court to determine whether a fair and just summary was required to be given to the appellant overcomes and outweighs the privilege of Order No. 3229 of the Attorney General.—See *United States v. Andolschek*, 142 F. 2d 503 (2d Cir.); *United States v. Krulewitch*, 145 F. 2d 87 (2d Cir.); *United States v. Beekman*, 155 F. 2d 580 (2d Cir.); *United States v. Cotton Valley Operators Committee*, 9 F. R. D. 719 (W. D. La. 1949).

The Government must be treated like any other legal person before the court. It has no special privileges as the king did before the Stuart judges in England.—*Bank Line v. United States*, 163 F. 2d 133 (2d Cir.).

The secret investigative report was material. The trial court could not discard his judicial function in determining whether or not a full and adequate summary had been made of the secret investigative report without receiving the secret report into evidence and comparing it with the summary made by the hearing officer.—*United States v. Nugent*, 346 U. S. 1; *United States v. Evans*, August 20, 1953 (D. Conn.).

It is respectfully submitted, therefore, that the trial court committed error in excluding the FBI report from evidence and depriving appellant of the use of it upon the trial to ascertain whether the hearing officer made a full and fair summary of the secret FBI investigative report.

ARGUMENT

POINT ONE

The board of appeal had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A-O.

White certified in his conscientious objector form that he was opposed not only to combatant service but also to noncombatant service in the armed forces. The undisputed documentary evidence filed by him fully corroborated this claim. He answered that he did not believe in the use of force under any circumstances. The FBI investigative report failed to reveal that he was willing to perform either combatant or noncombatant service.

The evidence developed before the hearing officer showed he would not do any kind of military service and that he would not kill.

The hearing officer found that White preferred to go into prison rather than to go into the army. He found that White was sincere.

The hearing officer, notwithstanding the undisputed evidence and his findings of sincerity, arbitrarily and capriciously recommended that White be classified in Class I-A-O. This classification made him liable for military service as a noncombatant soldier. There was no evidence to support this. This finding was in direct contradiction to all the undisputed evidence.

The board of appeal followed the recommendation. The final classification by the appeal board also is without basis in fact, arbitrary and capricious.

The argument that has been made in the companion case of *Tomlinson v. United States*, No. 13,892, under Point One of that brief is adopted here and made a part of this brief as though copied at length herein. Since that case is a companion case to this one and will be argued at the same time,

it is proper to refer to the argument in that brief. It is requested that the Court here consider that argument as the argument in behalf of White.

While the hearing officer does not give the board of appeal the precise reason why he recommended the I-A-O classification, it may be assumed that he recommended that White be put into the army as a noncombatant soldier because he was willing to work in a machine shop that at one time had a war contract. The hearing officer found that White worked on war contracts from 1949 to 1951.

That White may have worked on war contracts does not in any way constitute basis in fact for the I-A-O classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do noncombatant military service because he is willing to work on a war contract.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on war contracts allows the draft board to classify a registrant as a noncombatant soldier. As long as a registrant can prove that he has conscientious objections to military service, both combatant and noncombatant, he is entitled to the full conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial.

If the position that one who performs work that contributes to the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the Federal Government is contributing directly to the war effort. The money that he pays in taxes is used for the financing of the

military machine of this nation. Congress did not intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined what a conscientious objector is. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial. The classification here, therefore, that White should be ordered to do noncombatant military service in the armed forces because he had worked on war contracts is arbitrary and capricious.

While the Department of Justice did not make a big point about White working on war contracts in the machine shop, it may be argued in this Court by the Government that this was basis in fact for the classification of I-A-O that was given to him. Neither the act nor the regulations makes the type of work a person does a criterion to follow in determining his conscientious objection. The only questions for determination of conscientious objection are (1) does the person object to participation in the armed forces as a soldier? (2) does he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the State? (4) does his belief originate from a belief in the Supreme Being and not from political, sociological, philosophical, or a personal moral code? White's case commands affirmative answers to all these questions. White, therefore, fits the statutory definition of what a conscientious objector is.

It is entirely irrelevant and immaterial to hold that there was basis in fact for the I-A-O classification because White had worked in a machine shop and worked on war contracts. This was not an element to consider. It was no basis in fact for the classification given of I-A-O. It was also no basis in fact for the denial of the I-O classification. It did not impeach or dispute in any way what he said in his questionnaire. All of the documentary evidence that he submitted indisputably established that he was opposed to

both combatant and noncombatant military service. The law does not authorize the draft boards nor the Government to invent fictitious and foreign standards, not authorized by the statute, and then use them to deny the privileges that are granted by the statute and the regulations.—*Annett v. United States*, 205 F. 2d 689 (10th Cir. June 26, 1953); *United States v. Alvies*, 112 F. Supp. 618 (N. D. Cal. S. D. 1953); *United States v. Graham*, 109 F. Supp. 377, 378 (W. D. Ky. 1952); *United States v. Everngam*, 102 F. Supp. 128, 131 (D. C. W. Va. 1951).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when it is shown that the type of work done by him is of a combatant nature. The Congress of the United States provided for two kinds of conscientious objectors. One is a person who has objections only to performance of combatant service but who is willing to go into the armed forces and do noncombatant service. He is recognized as a conscientious objector. He is made to wear a uniform and do military service except that of a combatant nature. This type of conscientious objector does not have his conscience questioned because of his willingness to perform work or services in the army. It is submitted also that Congress did not intend to forfeit the claim for classification made by the conscientious objector to both combatant and noncombatant military service because of the kind of work that he does on the outside of the armed forces. Neither the law nor the regulations disqualify any conscientious objector on such grounds.

A reasonable interpretation of the act and the regulations does not allow the type of employment to become relevant as to whether or not there was basis in fact for the denial of the I-O classification. In any event, it certainly is no basis in fact for the I-A-O classification. If the I-A-O classification is given because of the type of work that is performed, then that classification is arbitrary and capricious.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on "his relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest or even imply that he was willing to per-

form any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

The decision in *United States v. Alvies*, 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.

It has been specifically held that an appeal by one of Jehovah's Witnesses from the conscientious objector classification requesting the minister's classification does not amount to a waiver of his conscientious objector claim.—*Cox v. Wedemeyer*, 192 F. 2d 920 (9th Cir.).

In situations similar to this the courts have uniformly held that the denial of the conscientious objector status is without basis in fact. (See *United States v. Konides*, No. 6216, District of New Hampshire, decided March 13, 1952, and *United States v. Konides*, No. 6264, District of New Hampshire, decided by Judge Woodbury, Circuit Judge, S. D., on June 23, 1953.) Copies of the opinions in these two cases accompany this brief. The *Konides* case was appealed to the National Selective Service Appeal Board twice. The board gave the I-A classification twice. After each classification there were orders to report for induction issued. *Konides* refused to be inducted twice, and each time an indictment was issued. Each time the indictments were dismissed because of the arbitrary denial of the conscientious objector status by the National Appeal Board.—See also *Annett v. United States*, 205 F. 2d 689 (10th Cir.); *United States v. Graham*, 109 F. Supp. 377 (W. D. Ky); *United States v. Pekariski*, — F. 2d — (2d Cir., October 23, 1953.).

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military service to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5:20) These are, therefore, conscientious objections to the performance of military service, which are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service and any other service as a part of the war efforts of the nations of the Devil's world. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5:15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Transla-*

tion) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17: 14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3: 20, *New World Translation*; John 15: 19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2: 3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16: 15.

Jehovah's Witnesses fight lawfully as such soldiers with all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1: 7, 16) They fight

with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10: 3-5, *New World Translation; Weymouth*.

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "Sword of the spirit, which is the word of God." (Ephesians 6: 17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thoroughly, to stand firm."—Ephesians 6: 10-13, *New World Translation*.

Since they are in the Lord's army of gospel preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow

from the affairs of this world. They cannot be in two armies at the same time. Since they have been enlisted and serve in the Lord's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit the Lord's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenant-breakers. "Covenantbreakers . . . are worthy of death." (Romans 1:31, 32) The nations of this world cannot excuse the Lord's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from the Lord's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation*.

In the Hebrew scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his peo-

ple fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like children's toys in comparison. (Joel 3:9-15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witness-

es are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3:8, *An American Translation*; Jeremiah 25:31-33; Nahum 1:9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render unto God that which

is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the armed forces of Caesar in international conflicts. They render unto Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation*.

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render unto Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand

they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of manpower for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim The Theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one individually, for himself, determines what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preach-

es the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemption from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church*, 1894, Crowell & Co., New York, p. 179 *et seq.*; E. R. Appleton, *An Outline of Religion*, 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.*; Capes, *Roman History*, 1888, Scribner's Sons, New York, p. 113 *et seq.*; Willis Mason West, *The Ancient World*, 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.*; Capes, *The Roman Empire of the Second Century*, Scribner's Sons, New York, p. 135 *et seq.*; Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such

classification is a dishonest one, making it unlawful.—*Johnson v. United States*, 126 F. 2d 242, at page 247 (8th Cir.).

There is a district court opinion that bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States v. Konides*, March 13, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips v. Downer*, 135 F. 2d 521, 525-526 (2d Cir.); *United States v. Grieme*, 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States v. Graham*, 109 F. Supp. 377 (W. D. Ky., Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep v. United States*, 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court

says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Yow v. United States*, 208 U. S. 8; *Ng Fung Ho v. White*, 259 U. S. 276; *Mahler v. Eby*, 264 U. S. 32; *Vajtauer v. Commissioner*, 273 U. S. 103; *Bridges v. Wixon*, 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus*." The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States v. Cain*, 144 F. 2d 944 (2d Cir.).—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction.—327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious ob-

jector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection*, Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra*, at page 43: "At the end of hostilities Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.'"

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.*, pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.*, page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

“No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun.”—*Ibid.*, pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard v. United States*, 328 U. S. 61. Read 328 U. S., at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

It is respectfully submitted, therefore, that the motion

for judgment of acquittal should have been sustained because the Department of Justice arbitrarily and capriciously recommended that White be classified I-A-O and the board of appeal so classified him, and for the further reason that there is no basis in fact for the denial of the full conscientious objector status claimed by White in his classification questionnaire and other documentary evidence. The trial court, therefore, committed reversible error when the motion for judgment of acquittal was denied.

POINT TWO

The court below committed reversible error when it refused to receive into evidence the FBI report and excluded it from inspection and use by the court and the appellant upon the trial of this case.

Upon the trial appellant subpoenaed the secret investigative report of the FBI. A motion to quash was made by the Government. This was denied. At the trial the court permitted the reports to be marked for identification and received as sealed exhibits after the trial court made an inspection of the exhibits. The trial court found the secret FBI report to be material but refused to permit them to be used as evidence.

The above point raised in this case is identical in every way to Point Four that is briefed and argued in the case of *Tomlinson v. United States*, No. 13,892, the case that is a companion to this one. All of the argument made in the brief for Tomlinson in that case at pages 19 to 20 and pages 41 to 53, applies here. It is hereby adopted and made a part hereof as though copied at length herein. Because these two cases are companion cases and identical in every respect, the Court is hereby requested to read and consider the argument made in the *Tomlinson* case which is applicable here.

The only difference between the question presented here and that involved in the *Tomlinson* case is that the hearing officer told White that all of the information in the secret FBI investigative report was favorable to him. White was led to believe and told by the hearing officer that there was no adverse evidence in it. The Government may argue, therefore, that because of this circumstance it was harmless error of the court below to refuse to permit the secret FBI investigative report to come into the record in this case. This is a plausible argument if it is accepted without a measure of caution. The weakness in the suggestion is that it assumes what the hearing officer said is true. The statement made by the hearing officer is impeached by his report that he made to the Department of Justice which was in turn accepted and forwarded to the appeal board. In his report he recommended against the full conscientious objector status.

Whether this recommendation was based on undisclosed adverse evidence in the FBI report or not is not made to appear. In any event, the fact that the FBI report was not received into evidence casts up upon the waters of speculation. Since the evidence was concealed and not allowed, it must be assumed that there was unfavorable evidence in the FBI report.

It is the responsibility of the trial court to determine whether or not there was any adverse evidence in the FBI report. He cannot shut his eyes or be blinded by the statement made by the hearing officer to White that there was no unfavorable evidence. The court, himself, should have received the FBI report into evidence and examined it and permitted it to be examined by the defendant to determine whether or not there was any adverse or unfavorable evidence in it that could have been or was relied upon as a basis for the denial of the conscientious objector claim.

What was said in *United States v. Packer*, 200 F. 2d 540 (2d Cir. Dec. 31, 1952), is applicable here. The court said:

“It is true that in the case at bar the defendant was told that the FBI report was altogether favorable to him. But the correctness of such a representation was, in our opinion, a matter which the defendant was entitled to judge for himself by seeing the original FBI record.”

While this case was reversed in *United States v. Nugent*, 346 U. S. 1, the statement just quoted is applicable here. It is authority for the assertion made here that it was up to the trial judge and the counsel for the appellant to judge for themselves as to whether or not a fair and adequate summary should have been made to White by seeing the original FBI record itself in the trial of this case in the court below.

It is respectfully submitted, therefore, that the trial court committed grievous error in excluding the FBI report in this case. The error was prejudicial to the appellant. The court should reverse the case and order it remanded so that the appellant can have a full and fair hearing in the trial court as to whether or not there was a fair and adequate summary of the secret FBI investigative report made to White at the hearing or whether such summary should have been made by the hearing officer when White requested it at the hearing. For this reason the case ought to be reversed and remanded for a new trial.

CONCLUSION

WHEREFORE the appellant prays that the judgment of the court below be reversed and the court ordered to enter a judgment of acquittal; or, in the alternative, appellant

prays that the judgment be reversed and the cause remanded for a new trial.

Respectfully submitted,

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December, 1953.

No. 13,893.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE FILED

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No. 13,893.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLAIR LAVERNE WHITE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on September 4, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [I,¹ pp. 2-3.]

On September 29, 1952, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on March 11, 1953.

On March 11, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable William C. Mathes, without a jury, and on March 30, 1953, the appellant was found guilty as charged in the indictment. [I, p. 23.]

¹"I" refers to Transcript of Record, Vol. I.

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years and judgment was also entered. [I, pp. 24-28.] Appellant appeals from this judgment. [I, p. 29.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This court has jurisdiction under Section 1291 of Title 18, United States Code.

II.

Statutes Involved.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Section 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

III.

Statement of the Case.

The indictment charges as follows:

“Indictment

[U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948]

The Grand Jury charges:

Defendant CLAIR LAVERNE WHITE, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 82, said board being then and there duly created and acting under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-C and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 18, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.” [I, pp. 2-3.]

On September 29, 1952, appellant appeared for arraignment and plea, represented by Charles E. Borning, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of not guilty to the offense charged in the indictment.

On March 11, 1953, the case was called for trial before the Honorable William C. Mathes, without a jury, and Harold Shire, Esq., represented the defendant. The appellant was found guilty as charged in the indictment on March 30, 1953. [I, p. 23.]

On April 6, 1953, the appellant was sentenced to imprisonment for a period of four years in a penitentiary. [I, p. 24.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. (App. Spec. of Error 1, App. Br. p. 9.)²

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. (App. Spec. of Error 2, App. Br. p. 9.)

C. The District Court erred in denying the motion for new trial. (App. Spec. of Error 3, App. Br. p. 10.)

D. The District Court committed reversible error upon the trial when it excluded the secret investigative F.B.I. report and denied appellant the right to have it used at the trial to determine whether or not the hearing officer made a fair and adequate summary of the adverse evidence appearing in the report as required by due process of law, the act and the regulations. (App. Spec. of Error 4, App. Br. p. 4.)

²“App. Spec. of Error” refers to “Appellant’s Specification of Errors”; “App. Br.” refers to “Appellant’s Brief.”

IV.

Statement of the Facts.

On July 14, 1949, Clair Laverne White registered under the Selective Service System with Local Board No. 82, North Hollywood, California. He was eighteen years of age at the time, having been born on July 13, 1931. He gave his occupation as "press operator" and indicated he was employed at the North Hollywood Tool and Die Co. [F. 1.]³

On November 9, 1950, the appellant filed with Local Board No. 82, SSS Form 100, classification questionnaire. [F. 5-14.] In Series VI he stated that he was a minister of religion, but that he did not regularly serve as a minister of the Jehovah's Witnesses. [F. 7.] He stated that he was a punch press operator and had worked 1½ years at the trade and expected to continue indefinitely at the trade. [F. 8.] He stated that he worked an average of 48 hours per week and was paid at the rate of \$1.20 per hour. [F. 9.] The appellant signed Series XIV of that questionnaire and thus, informed Local Board No. 82 that he claimed exemption from military service by reason of conscientious objection to participation in war. He also requested further information and forms. [F. 11.]

SSS Form 150, Special Form for Conscientious Objector, was furnished to the appellant and he completed this form and filed it with Local Board No. 82 on November

³Numbers preceded by "F." appearing herein within brackets refer to pages of Appellant's draft board file. Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Appellant's draft board file. At the bottom of each page thereof appears an encircled handwritten number which identified the pages in the draft board file.

20, 1950. The appellant claimed to be conscientiously opposed to participation in war in any form, by reason of his religious training and belief. [F. 15-20.]

On January 15, 1951, the appellant was classified I-A-O by Local Board No. 82 and was mailed SSS Form 110, Notice of Classification, on January 16, 1951. [F. 12.]

On January 18, 1951, the appellant filed Notice of Appeal from his classification and requested a personal appearance before the board. [F. 23.] On January 29, 1951, the appellant appeared before the Local Board. The Local Board reviewed the case and retained the appellant in Class I-A-O, indicating that their decision was influenced by the fact that the appellant was then employed by a company which was manufacturing parts for airplanes. [F. 12, 22, 24.] Appellant was notified of these facts on January 30, 1951. [F. 12.]

On March 19, 1951, the appellant's file was forwarded to the Appeal Board. [F. 12.] On April 11, 1951, the Appeal Board reviewed the file and determined that the appellant was not entitled to a classification in either a class lower than IV-E or Class IV-E, and the file was forwarded to the Department of Justice for an advisory opinion. [F. 12, 38-41.]

On March 6, 1952, a hearing was held by the Hearing Officer of the Department of Justice pursuant to notice, and the appellant appeared at the hearing. The Hearing Officer recommended that the appellant be retained in Class I-A-O. [F. 42-43.]

On April 11, 1952, the Attorney General, Department of Justice, recommended that the appellant be retained in Class I-A-O. [F. 44.]

On May 19, 1952, the Appeal Board classified the appellant in Class I-A-O and notified the appellant of this action. [F. 12.]

On May 29, 1952, the appellant filed a Notice of Appeal to the President. [F. 12, 45.] The appellant was advised in writing on June 3, 1952, that his file was not forwarded to the President because the Appeal Board vote was unanimous. [F. 46.]

On June 24, the appellant was ordered to report for induction on July 7, 1952 [F. 47.] On July 11, 1952, the Local Board was notified of appellant's failure to report for induction on July 7, 1952. [F. 49.]

The appellant reported to his Local Board and was presented with an Order to Report for induction on July 18, 1952. [F. 12.]

On July 18, 1952, the appellant reported for induction as previously ordered, but refused to submit to induction into the armed forces of the United States. [F. 12, 51-52.]

V.

ARGUMENT.

POINT ONE.

The Classification of the Appellant by the Appeal Board in Class I-A-O Was a Valid Classification.

The classification of registrants by Local Boards and Appeal Boards are provided by 50 U. S. Code, App., Section 460, which provides in pertinent part:

“ . . .

(b) The President is authorized—

(3) to create and establish . . . civilian local boards, civilian appeal boards, . . . Such local boards . . . shall, under the rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. . . .”

The Appeal Board has jurisdiction, thus, to hear appeals and classify anew.

32 C. F. R., Section 1626.26—Decision of Appeal Board—provides:

“(a) The appeal board shall classify the registrant, giving consideration to the various classes *in the same manner in which the local board gives consideration thereto when it classifies a registrant*, except that an

appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

(b) Such classification of the registrant shall be *final*, except where an appeal to the President is taken: Provided, That this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of Part 1625 of this chapter.” (Emphasis added.)

The classifications of the local boards and later the appeal boards made in conformity with the regulations are *final* even though erroneous. The question of jurisdiction arises only if there is no basis in fact for the classification.

Estep v. United States, 327 U. S. 114;

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Appellant contends that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections or veracity, and that, therefore, the action of the Board in classifying in Class I-A-O was arbitrary, capricious and without basis in fact. A reading of the appellant's Selective Service file [Govt. Ex. 1] would indicate the contrary.

Selective Service Regulations, Section 1622.11 (32 C. F. R. 1622.11), provides:

“Sec. 1622.11—Class I-A-O—*Conscientious Objector Available for non-combatant military service only.*”

(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of re-

ligious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

‘Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code.’ ”

Selective Service Regulations, Section 1622.14 (32 C. R. F. 1622.14), provides:

“Sec. 1622.14—Class I-O—*Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National health, safety, or interest.*”

(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and non-combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

‘Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a purely personal moral code.’ ”

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classifi-

cation as a conscientious objector in classification I-A-O and I-O. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards and later the Appeal Boards. The boards are left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may have been erroneous, is final in the absence of arbitrary or capricious conduct on the part of the Board so classifying a registrant.

Estep v. United States, supra.

To aid the Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objection in addition to SSS Form 100, Classification Questionnaire. The questions and answers given thereto by a registrant are the basis of a classification by a Board within the broad terms of Selective Service Regulations, Sections 1622.11 and 1622.14. The burden is upon the registrant to maintain and prove his claim within these categories.

United States v. Schoebel, 201 F. 2d 31;

Davis v. United States, 203 F. 2d 853.

This burden was not met by the appellant in the present case as evidenced by the classification given him by the Board.

A reading of the record in the instant case presents no circumstances which disclose any bias, prejudice, arbitrary, capricious or unreasonable conduct on the part of the Board in the classification of the appellant. The trial court, therefore, properly denied appellant's motion for judgement of acquittal.

POINT TWO.

The Trial Court Committed No Error When It Refused to Receive Into Evidence the F.B.I. Report and Excluded It From Inspection and Use by the Appellant in the Trial of This Case.

At the trial, the court made an *in camera* examination of the investigative reports of the Federal Bureau of Investigation, marked Defendant's Exhibits A, B and C. The court held that the reports were not sufficiently relevant to outweigh the public interest in the preservation of the confidential character of executive documents pursuant to the Attorney General's regulations. [II, pp. 47-48.] It is within the power of the trial court to exclude irrelevant, immaterial and incompetent evidence. Furthermore, procedural irregularities or omissions which do not result in prejudice to the defendant (appellant) are to be disregarded.

Martin v. United States, 190 F. 2d 775 (4th Cir.);

Tyrrell v. United States, *supra*;

Atkins v. United States, 204 F. 2d 269.

United States v. Nugent, 346 U. S. 1, appears to be applicable in this case. The procedure followed by the Department of Justice in this case was in accord with the *Nugent* case which held that the conscientious objector was not entitled to inspect the investigator's reports (pp. 5-6), and that the Department satisfies its duties by permitting the registrant to present his views and relevant evidence, and to supply him with a fair résumé of any adverse evidence in the investigator's report (p. 6), if he requests it. Here, since there was no unfavorable evidence [II, p. 41, line 4], this duty has been satisfied.

VI.

Conclusion.

The appellant was duly and validly classified by the Appeal Board.

No error was committed by the trial court by not placing the investigative reports of the Federal Bureau of Investigation into evidence.

There was no error by the District Court in denying the motion for acquittal of the defendant.

There was no error by the District Court in entering a judgment of guilt against him.

There was no error by the District Court in denying the motion for a new trial.

There was no error of law in the rulings of the trial court, and therefore, the conviction should be affirmed.

Respectfully submitted,

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No. 13893

**United States Court of Appeals
FOR THE NINTH CIRCUIT.**

CLAIR LAVERNE WHITE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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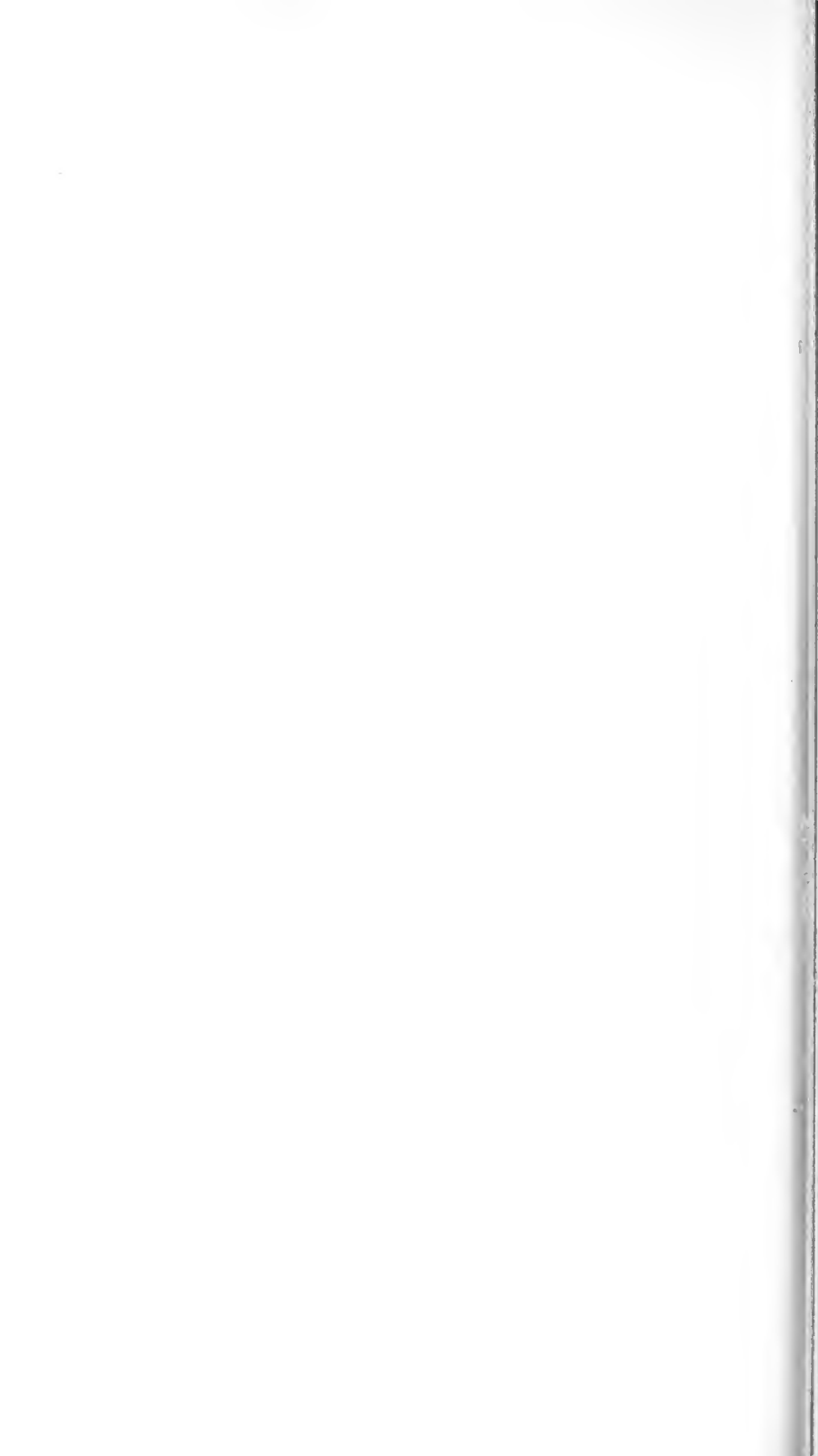
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No. 13893

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REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the
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Central Division.

MAY IT PLEASE THE COURT:

What has been said in the reply brief for appellant in the companion case of *John Alan Tomlinson v. United States of America*, No. 13892, filed in this Court, will be referred to in this reply brief rather than to repeat the same information here.

I.

The appellee says, at page 9 of its brief, that a reading

of appellant's entire Selective Service file indicates that there was contradictory evidence disputing the claim for classification as a conscientious objector. Nowhere does the appellee point to one single part of the Selective Service file in support of such assertion. Unless and until appellee can support its statements by factual references the mere assertions should be rejected.

II.

It is stated by appellee, at pages 10-11 of its brief, that there is no evidence of arbitrary and capricious action on the part of the local board. The plain answer to this is that the I-A-O classification (in the face of undisputed evidence showing the registrant to be opposed to both combatant and noncombatant military service) is arbitrary and capricious *per se*. Without basis in fact it compromises the bona fide claim of White. In answer to appellee's argument see pages 21-27 of the main brief for appellant in the *Tomlinson* case, No. 13892.

III.

The appellee argues, at page 11 of its brief, that the denial of the full conscientious objector status is proper, that the act left the board to finally determine the classification. It is then argued that the adverse classification proves basis in fact for the denial of the claimed classification.

This is a conclusion based on an assumption. The argument is faulty. It does not hold water. It is true that the classification by the draft board is final but it is final only when it is supported by basis in fact. The mere fact that the draft board makes a determination is never any basis in fact. The basis in fact must be found outside the classification itself.

This argument of appellee reminds one of the excuse usually given by a child when called upon to answer why it has done a certain thing. The answer is "Because."

Why? "Just because." This is the same sort of answer the appellee makes. It has basis in fact "because," but the appellee does not say because of what fact. It merely says the appellant was properly classified because he was classified by the board. This type of argument is no argument at all.

IV.

Since appellant filed his main brief, new and additional cases have been handed down or cited in the reports, which are now available. These cases support the proposition made by appellant that the denial of the conscientious objector status is without basis in fact.—*United States v. Pekarski*, 207 F. 2d 930 (2d Cir. Oct. 23, 1953); *Schuman v. United States*, — F. 2d — (9th Cir. Dec. 21, 1953); *Jewell v. United States*, — F. 2d — (6th Cir. Dec. 22, 1953); *United States v. Hartman*, — F. 2d — (2d Cir. Jan. 8, 1954); *United States v. Benzing*, No. 5862-C, Western District of New York, January 15, 1954; *United States v. Lowman*, No. 6093-C, Western District of New York, January 15, 1954; *United States v. Loupe*, No. Cr. 249-52, District of New Jersey, July 17, 1953; *Taffs v. United States*, 208 F. 2d 329 (8th Cir. Dec. 7, 1953).

V.

The appellee takes the position, at page 12 of its brief, that the trial court committed no error when it refused to allow the use of the secret FBI investigative report at the trial. It was found to be material. The appellant demanded to be informed of the adverse evidence appearing in the file. The hearing officer told him there was no adverse information in the file. This by no means settled the question. See pages 34-35 of the appellant's main brief.

Since appellant filed his main brief, the following cases supporting the position of appellant under this point have been handed down. First, the case of *United States v. Evans*, decided by the District of Connecticut, is now

reported. It will be found at 115 F. Supp. 340. The following additional cases are available: *United States v. Stull*, Cr. No. 5634, Eastern District of Virginia, November 6, 1953; *United States v. Brussell*, No. 3650, District of Montana, November 30, 1953; *United States v. Parker* and *United States v. Broadhead*, Nos. 3651, 3654, District of Montana, December 2, 1953; *United States v. Stasevic*, No. C. 142-143, Southern District of New York, December 17, 1953.

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

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